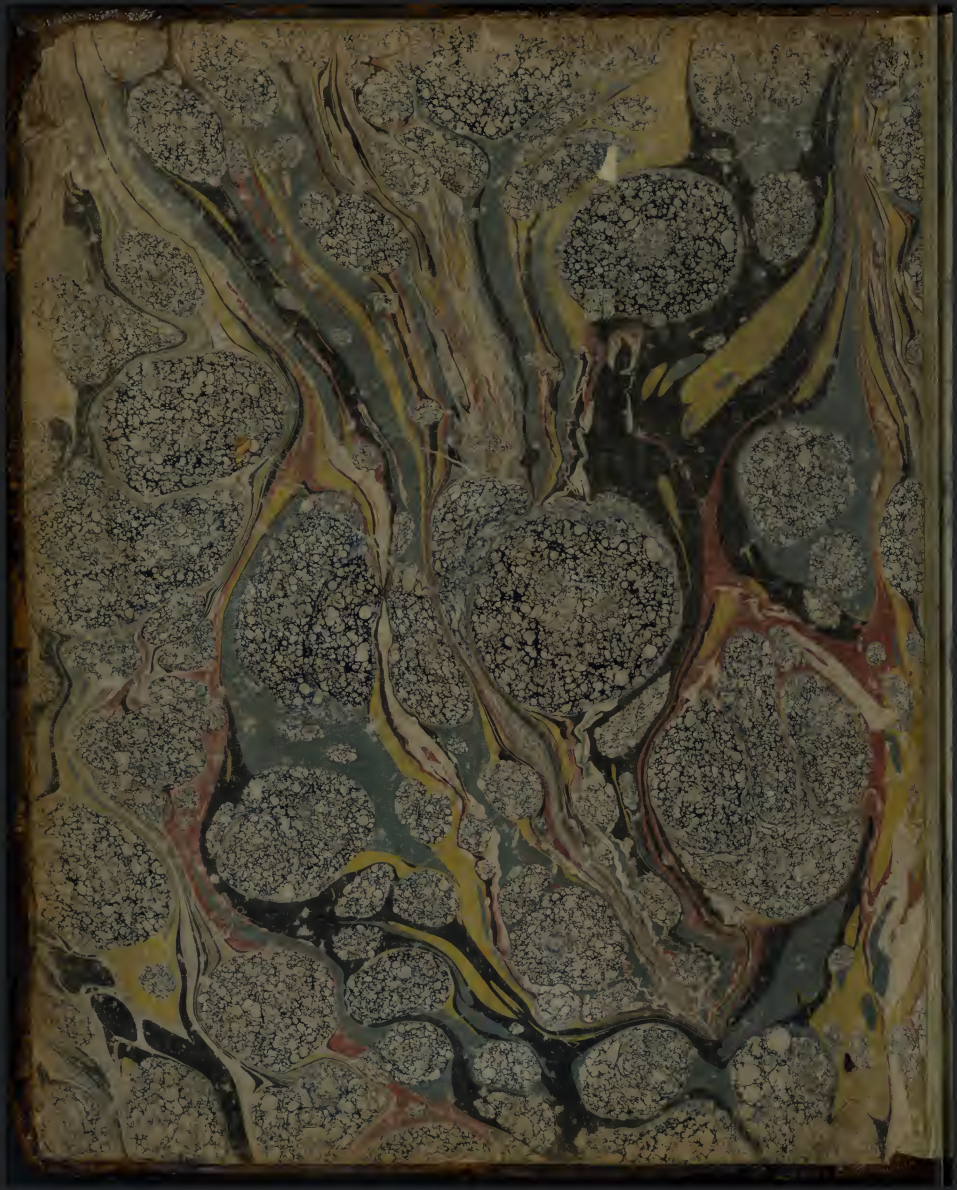

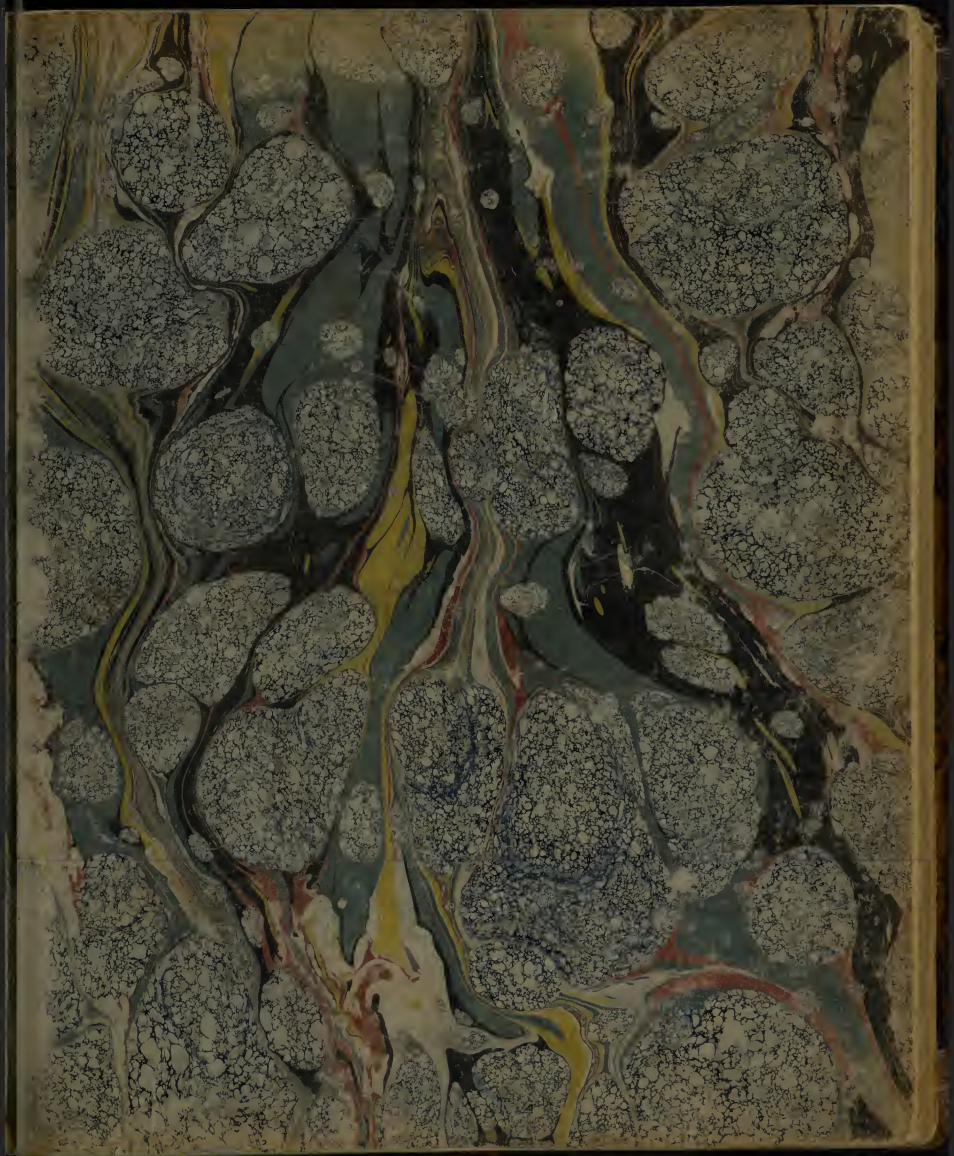

A Burkers

A General view of the subject of Shades and Shadings.

Ideas and Pleadings.

Before we enter particularly into a consideration of this subject it may be useful as a preliminary step to take a general view of it.

After a suit is commenced and the nature of the complaint stated in the declaration with precision the first step on the part of the Defendt. is in some cases to suffer a default this happens when the Deft. in a suit having no defence to make against the suit is publickly called three times in court and does not answer. In such case judgment of course goes against the Deft. for something. The quantum of damages is not however fixed immediately on a default; as the Deft. will be heard on motion to the Court in damages before they are assessed. If the suit is brought for a sum certain as on a note or covenant if no motion is made by the Deft. to be heard in damages judgment will be rendered for the sum due togather with the interest if on interest. If there are indorsements on the note they will be noticed in making up the judgment. If payments have been made and receipts given they must be exhibited to the Court in order to be allowed. In Great Britain and many other places the amount of damages to be recovered are ascertained by a Jury of enquiry with the Shriff at their head. But in Con. the clerk of the Court casts up the interest and issues the execution for the sum due -

Remarks

Pleas and Pleadings.

It may be that the damages demanded are presumptive as for breach of a contract to build a house &c, now who shall assess them? In this case if the Deft. does not appear to be heard in damages, and the face of the instrument does not furnish a rule to go by then judgment will be rendered for the sum demanded in the declaration and Writ issues for such sum.

But if the Deft. appears and moves to be heard in damages then in Eng. a Jury of Enquiry assesses them. But in Con. the Court which is our Jury of Enquiry, assesses which is evidently contrary to common law principles.

There is one set of cases where the sum is apparently certain and yet the Court may assess the damages this is where there is a bond with a penalty in such cases both in Eng. and Con. chancery it down to the proper sum: This authority to chancery is given to the courts by statutes both in that & this country.

If the Deft. appears and answers to the Pft. unit his first step is generally to examine the Writ and see whether it is abatable. If he finds it defective in any part he then puts in his plea of Abatement. In our county Courts the docket is called the first day of the term and the Deft's Attorney takes the writ and examines to see if abatable and if so he makes ~~he makes~~ out his plea in abatement and when he comes into Court again he lays it in. This is a dilatory plea and goes either to the Jurisdiction of the Court, to the person of the Pft. or Deft. either as to name place of abode &c or to the writ itself.

Example to the first. Suppose the writ demands $16 for slander before a Justice, here you may plead it in abatement tho' (by the

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way) you are not obliged to do it. Example to the second. Suppose you are sued by a wrong name and do not appear to the suit and Judgment & Execution go against you by such wrong name; to be sure it is not collectable of you but if you do appear you may plead it in abatement. Example to the third. Suppose no duty is certified on the writ or the magistrate mis-signes his name or he omits his in the signature there are abatable defects in the writ.

In short this plea is proper whenever the Deft. wishes to assign any reason why the Pltff. should not proceed in this particular suit. If the plea is sufficient the Judgment is that the writ abate. If insufficient then then the Judgment is "quod respondeat ouster" and then you have done pleading in abatement to that suit.

Every cause of abatement is plead by writing indeed by pleading it is meant that it be in writing.

If any thing which can be taken advantage of in a plea of abatement is passed over in this place you are considered as waving it and are cut off from ever taking advantage of it in any other stage of the proceedings. Except where it would be error in the court to proceed then it may be taken advantage of in any stage.

It is a rule that when you plead in abatement, you must if in your power state such facts as will enable the Pltff. to make a better writ. If the Pltff's place of abode is mis-described you must not only state that he does not ~~only~~ belong to such place but must also state where he does belong

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You will remark however that that the Deft. is not obliged to be at anything or expense to enable the Pltff. to get a better writ.

Every part of the process which is not declaration is called the writ. Where "In an action or plea of the case whereupon" begins it is declaration and when you get "the Pltffs damage" the declaration ends and the writ begins again.

If you find the writ sound and no defect in it your next step will be to look into the declaration and if you think the facts there stated not sufficient to support the action you will demur to the declaration. As suppose the Pltff. states in his action for slander that you called him "a liar" there words not being actionable you must demur, for there is no grounds of his recovery.

This demurrer admits all the facts well stated in the declaration but it says the law respecting them will not allow an action to be maintained for uttering the words or in other words it admits all the facts which are averred and regularly pleaded by the Pltff. but denies their sufficiency in law.

There are certain contracts on which you cannot recover unless the Deft. has had proper notice; here if notice has is not given and averred there is no liability and therefore you may demur.

There are two kinds of demurrers General and Special. A General Demurrer does not point out the grounds of Demurrer whereas a Special one does. The Special demurrer goes to such defects in the

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declaration as are formal defects. General demurrers are for substantial defects and do not reach formal defects. Where you wish to demur for informality in the declaration you must "put your finger on the spot" which is informal by a special demurrer, it says the statement is not done in a lawyer like manner Ex-gr. A law says that in some cases notice must be given in writing, but the Plfts declaration does not state that it was given in writing here you must use a special demurrer. General demurrers then from their nature must inevitably preclude a recovery if adjudged sufficient.

Where you state in a declaration that Judgment have been rendered and Exn issued thereupon thereon you must likewise state that such Exn was signed by J.P.'s clerks of the court (or C.P.'s of as the case may be) in order to show that it was legally signed and if this is omitted it may be demurred to. suppose one pleads that he tendered, he must state sufficient to show that he has done it legally and if not stated you may demur.

A General demurrer is also proper where the declaration is good in point of form and where the subject matter is actionable but some essential is omitted. As if it is one of those cases where it is necessary to state notice in the declaration and it is omitted. In this the subject of a special demurrer? No for it is not a formal defect but a substantial one.

To conclude. In all cases then where there is no ground

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of action it is the subject of a general demurrer.

So where an important allegation is left out. —— But there is a good ground of action and no important allegation left out, but it is unlawfully stated, then it is the subject of a special demurrer.

The judgment on a demurrer is a judgment in chief for if the demurrer is insufficient then as the facts have been ~~stated~~ confessed by the demurrer judgment is entered up. But if the demurrer is sufficient then the writ falls to the ground and goes out of Court. Where the demurrer is insufficient the Court enter up Judgment for the Plff. for the whole demand unless liquidated by a jury of inquiry in Great Britain or the court which is one ~~writ of enquiry Court of enquiry~~ Jury of inquiry in Can.. The court will always suffer a hearing in damages if desired and then render judgment for the amount found due. Mr. R. thinks that on special demurrer the judgment ~~ought~~ ought not to be in chief.

But suppose no grounds of abatement is found in the writ or grounds of demurrer in the declaration what is the Defts next step? Suppose the Defts. never did the act or made the promise alledged ~~the promise~~ by the Plff.? then he will deny all the facts stated in the declaration by pleading the General Issue. This being a question of fact is always tried by the Jury; the court never meddle with it except to see fair play is done as that no improper testimony is admitted &c.

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Pleas and Pleadings.

The general issue is in some cases used to deny only one material fact in such cases all such facts the other facts are admitted. The plea denies the fact simply. As if you want to plead that notice has ~~been given~~ not been given, where the Deft. has sued you on a bill of exchange protested, and alledges that notice has been given, you may plead that the Pltff. did not give you notice. This is not a proper plea but a special traverse (except in its form) to the declaration to this that no notice was given ~~the~~. Pltff. may reply that notice was given and here the parties go to trial on the question of notice alone.

Notwithstanding there is no defect in the writ or declaration and all the facts stated are true, yet there may be something which has happened which will bar the Pltff. from recovering. or if the Deft. has a discharge &c. this is done by Pleading in Bar.; and it admits all the facts the same as a demurrer does but introduces on the records new matter which is intended to avoid ~~them~~ them, which new matter (or story) goes to destroy any recovery. As. an award where the cause of action has been submitted to arbitrators. So of infancy which is new matter. As payment, tender, accord and satisfaction, Stat. of Limitations &c.

Many things which may be pleaded in bar may under our stat. be given in evidence under the General issue also. We have now arrived to where it is the Pltffs turn to plead.

Perhaps the Deft's plea in bar is the matters therein

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contained no insufficient in law, then the Pltff. may demur to it. As if the plea in bar is that the money was always ready if the Pltff had only called for it this is not sufficient in law to bar the action for it must have been tendered to operate as a bar.

But suppose the matters stated in the plea in bar are sufficient if true. As if the plea state that on such a day he the Deft. paid &c. but the Pltff. says he never did pay; here he must Traverse by asserting the right of recovery the Defs plea notwithstanding "without that" &c thus denying the facts stated in the ~~Pltffs plea~~ Deffts plea.

But supposing the plea in bar is sufficient, and is true but the Pltff. has some new matter to set up in avoidance of it, as where infancy is plead in bar and it is true that the Deft. was a minor but by something which has happened since (as a new promise) liable; here the Pltff. may reply over this new promise.

But suppose the Deft. says true he did make this new promise, but the stat. of limitations has barred it, this is called a Rejoinder. This re=joinder is always the Defts. answer to the Pltffs replication. & this may be either 1st a demurrer or second 2d a traverse or 3rd the Deft. may still proceed to adduce new matter of avoidance against the replication.

Example of a Rejoinder by traversing the Pltffs replication. A promise is made on infancy is plead, the Pltff. replies true the Deft. was an infant but the promise was for necessaries. Deft. rejoins that they were not ne=cessaries.

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A Rebutter & Surrebutter sometimes follow. but it very rare that you will find them going further than a rejoinder. There is one case in the books (says Mr R.) of a "Re-rebutter".

There would be perfect symetry in all this, were you not permitted to give in evid evidence under the general issue things which do not deny the declaration. In Eng. under non assumpsit you may give in evidence anything which goes to prevent a recovery i.e. anything which goes to shew that the Deft. is not at this time liable. This goes farther than in Lou. for here the stat. says if the Pltff. has a discharge given a discharge it must be plead and cannot be given in evidence under the general issue. The Court have extended this even to Army and Infancy. But in other actions besides Asst. we go greater lengths as to giving in evidence under the general issue than they do in Eng.

To plead specially is always preferable to the General issue as it removes matters of law for the court, does not submit them to the Jury. Besides more fair play is given to the Pltff. for he will then be better prepared, but in case of giving in evidence under the general issue he is frequently come upon by surprize.

The Pltff. is not obliged to deny all the allegations of a plea in bar but may traverse any material fact and thus admit the all the rest.

A Pltff. may sometimes "trip up" his own declaration as suppose the Deft. discovers that the Pltffs declaration is bad but he

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does not want to demur and suffers it to pass but pleads a poor plea in bar and the Pltf. demurs to this plea this demurrer goes back clear thro' the whole and reaches the declaration, thus destroying it if it is bad.

Suppose a Deft. should undertake to plead thus, that true it is he gave and executed the note on which &c. but it corruptly agreed that more than legal interest should be given ~~for~~ Viz. £5 too much, the Pltff. traverses the point that too much was given and the Jury say that too much was given; here it might have been that it was an agreement of hazard & therefore not usury this is an Immaterial Issue for it does not decide the question and may be made the subject of a motion in arrest on which a Repleader will be granted.

The general issue has been plead and a verdict found against the Deft. can he stir any farther? It may be after all that the declaration is good for nothing but it has escaped the attorneys notice till after verdict will an arrest be allowed here? Whenever the declaration is substantially defective and where it will be error in the court to render Judgment as where an important allegation is omitted on motion to the court they will arrest the verdict.

But where the defect is merely formal and could have been the proper subject of a special demurrer then in ordinary cases a motion in arrest will not be allowed. The reason this cannot be arrested is that it is cured by verdict. The Jury are presumed to have found those things proper for special demurrer. But not so where a material allegation is

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omitted.

This motion in arrest may be made by the Pltff. too, when the plea in bar is in the same situation as a ~~plea in bar~~ declaration must be in order to entitle the Deft. to an arrest.

Whenever a party thinks himself agrieved by the decision of a question of law he may bring a writ of Error to a higher court. These writs of error lie from the judgment of Assistants and J. of Peace, of city courts, & courts of common pleas to the superior court and from the superior court to the supreme court of Errors — This writ stays the judgment below ~~untill~~ until ~~untill~~ it is decided and if the judgment is affirmed the proceedings are continued as tho' no writ had been taken.

But suppose after all this the party has found ~~new~~ new testimony which he thinks would have saved his cause, what step can he take? he may bring a petition for a New trial — New trials are granted for various other causes too ~~new~~ numerous to be detailed in a view so general as this —

This praying oyer is where the suit is brought on some instrument and the Pltff. has not recited the instrument at large in his declaration here the Deft. cannot demur to it as it stands, for the Pltff. in his declaration ~~has declaration~~ has given such a construction to the instrument as has best pleased himself, and perhaps widely different from the true construction. Now the Deft. may pray oyer of the instrument and recite it & thus it becomes a part of the Pltffs declaration and then

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~~and then this the~~ Demur to it — case — A man going to Newyork to take up goods procured another to recommend him thus (taking care to stear clear of making himself liable) Viz. "that he was an industrious clever man and would probably ~~would~~ pay him for the goods" the recommendation was sued on without reciting it at large — The Deft. prayd oyer of the re=commendatory instrument recited it and then demurred to it and it was found not to be such an instrument as subjected him.

There are frequently great questions respecting what ought to be the construction of instruments, one man will give one con=struction while another would give a very different one —

Formerly this ~~was praying~~ oyer was praying to have the in=strument read but now it is praying for a copy of it which the Pltff. must make out and deliver himself or permit the Deft. to take a copy —

The Pltff. may also pray oyer; As where the Deft. pleads in bar a release and if the Pltff. thinks it insufficient to bar the act=ion, he may demur to it —

Whenever therefore a construction is given to an instrument which does not accord with the opposite party's ideas of it, he may pray oyer and demur —

Suppose you are perfectly ~~correct~~ content with the Pltffs declaration and all the proof in support of it, but think that the evidence is insufficient in law to entitle him to recover hear you

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may Demur to the Evidence. As if A. is sued for Assault and Battery and it is proved that A. was provoked to it by the first assault from the Pltff. this evidence being insufficient to ground a recovery A may demur to it—

The Pltff. may also demur to the Deft's evidence — As if the Deft. plead usury he but his evidence does not prove it to be such, the Pltff. may demur to it.

The court ~~cannot compel a joinder~~ will not compell a join=der in demurrer to evidence but leave it optional with the party whether he will join or not—

Where the testimony is "written" there is no need of the other party's agreeing to your statement of it, as there is in case of parol testimony—

It is common for lawyers to file bills of Exceptions and it is gen=erally to cases of testimony the reason of it is this the Pltff. offers a witness to prove his declaration the Deft. objects to his admission and the court decide that he cannot testify; here the Pltff. in order to get the question before a higher court files his bill of exceptions stating the ~~and~~ testimony &c &c the court examine the statement and if correct they sign it and this lays a foundation for a writ of Error. These bills are usually drawn by the Attorneys but (as before mentioned) signed by the court.

And so the Deft may file a bill where he thinks the witness

Remarks

ought to have been rejected when he was admitted.

A bill of Exceptions may be filed to any opinion of the Court; suppose the jury bring a verdict and the court are of opinion that the question of law before the jury is not correctly decided and send them out again and they bring in a verdict the other way here the party may file a bill of exceptions.

In Lou. if the court decide that the writ abate the Pltff. shall have liberty to amend the defect on paying down to the Deft. his costs to that time.

We have an other ancient law in Lou. authorizing a party when he supposes he has missed his plea which would have saved him in his just cause, to alter it. By this the Deft. might clearly vex the Pltff, but the court are authorized if the new plea be found insufficient to give the other party damages for what he has suf= =fered by the others delaying by altering.

But we have an other stat. by which a party may amend any defect mistake or informality in the writ declaration or pleadings or other parts of the record. But here the court at their discretion will give the other party costs. And by the same stat. in case of any amendment of the declaration the court must grant the Deft. a reasonable time to make answer to it.

Remarks.

The subject of Pleas and Pleadings.
treated of in detail.

Remarks

3 Bla. 393.
10 Co. 132.
3 Bla. 393
4 Bac

~~* Ex. Injury — [illegible] it would [illegible] to [illegible] the trespass [illegible] the property of B~~

Con —

(c) Ex. Dolination in trespass for entering the Pltfs land — Against him who unlawfully enters on my land I have a right to recover damages — the defendant has unlawfully entered the Dego I have a right to —

3 T.R. 259
159 —
Doug. 278

3 Bla. 396

Pleas and Pleadings.

Pleadings are the mutual allegations and altercations between the Pltf. and Deft. in a suit put into legal form and set down in writing.

Formerly pleas were in parol and altogether verbal; hence the expression of the parol demurring. But now they are altogether reduced to writing.

In Great Britain from the time of William the conqueror until the 36th Edward III. Pleadings were in Norman french which is properly the language of the law. From this time till 4th of George III they were in latin and by a stat. of that year they were reduced to english in which language they have ever since continued.

The English reports till the time of Carlos II were in Norman french because the pleadings were in that language tho' the greater part of them are now translated.

In structness pleading is nothing more than the setting forth such facts as shew in law the justness of the Pltfs demand and the fitness of the Defts defence. 1 Bac 1.

L.d Mansfield says that the substantial rules of sound pleading are founded in strong reason and the closest logick and Littleton that it is the most honorable part of the profession. 1 Burr. 319

X Every declaration which does not contain the elements of a good syllogism (o) is usually bad. In this syllogysm the major term or proposition is denyed by an issue in law or a demurrer; and the minor term by an issue in fact or the General issue or a special plea in bar

Remarks.

Then the plea of release forms an other syllogisms Thus - If he on whose land I have trespassed release the trespass - his right to cease - The Plaintiff has released to me the trespass complained of Ergo, his right to cease - All pleading is a syllogistical process -

3 Bla. 273.
Comp. 454.
7 Term. 4.
1 Wils. 147.
Carth. 233
Stra. 156
1 Vent 28
2 Burr. 960
1 Bac. 41.
Cro. El. 677
Cro J. 11 -
Cro R. 48.
3 Burr. 132.
2 Hawk. 273

Action commenced in N. Y. from the time of suing out the writ. 12. J. R. 69 or 89 - & authorities cited Lowry vs Lawrence - 3 John. 42. Cheathom vs Lewis - 1 John 342 -

1 Root. 486.

Co Lit. 17a
3 Bla. 203
Cloud. 54.

Pleas and Pleadings.

If the two terms of a the syllogyms are admitted the conclusion cannot be denied except by pleading some new matter as a release or special matter in avoidance.

The object of pleading is to enable the Pltf. to state his case as it ought to be, and the Deft. to answer in the proper manner.

The Writ.

The writ is the first stage in every suit; it is a manditory precept or letter directed to the Sheriff and issued by proper authority, the object of which is to compell the appearance of the Deft.

The suit is generally commenced from the date of the writ, but in the B. R. it is not commenced until the bill is filed, tho' this is after the return of the latitat: because in their court the bill is analagous to a bill in chancery; hence it is considered the original commencement of the suit.

On low the Declaration and writ issue together but the suit is not deemed to commence to all intents and purposes until the service.

Hence it has been decided in our superior court that a tender was good after the writ was signed ~~with~~ without tendering the cost of the writ.

But in some cases the suit is deemed to commence from the date of the writ.

2d. The Declaration or Count is the first ~~speck~~ step in the pleadings these two words have been used as synonymous but a distinction

Remarks.

4 Bac. 1
6 Rep.
4 Bac. 81.
5 Cow. D.
18. 3 Bla
296

5 Cow. 18.
4 Bac. 8.

4 Bac. 6.

3 Bla. 301.
4 Bac. 35.

3 Bla. 303
Id. 305 & 6.

4 Bac. 54.
5 Mod. 132.
4 Bac. 129

Pleas and Pleadings.

has lately obtained Viz. If there are two or more counts or distinct relations statements in the cause each distinct statement is called a count, and all them together the Declaration. Yet when there is but one count the words are synonymous.

The count is but amplification or exposition of the original writ. The writ states the cause of action but not the special facts out of which it arises since these are reserved for the declaration.

Those pleadings which follow this are such as the Deft. makes by way of defence and the Pltff. to fortify and support his declaration and destroy the Deft's. answer. 4 Bac 1. 3 Bla 299. 301.

3d The plea of the Deft. is of two kinds 1st Dilatory pleas and pleas to the action 2d Pleas to the Action.

1st Dilatory pleas are such as tends to delay the suit and by which the Deft. questions the propriety of the mode in which the Pltff. sues his remedy and not his cause of action.

Dilatory pleas are of 3 kinds 1st Pleas to the Jurisdiction of the court 2d To the disability of the Pltff. & 3d Pleas in abatement. The two last tho' often confounded are as distinct as any other pleas.

2d Pleas to the action are answers to the merits of the complaint they deny the cause of action either by an express denial or by confessing and avoiding the allegations therein contained.

There are of two kinds 1st General Issue 2d A Special plea in bar. A Demurrer is not strictly a pleaing plea, since it is rather

Remarks.

Co. Lit. 42a.

Hob. 164.
Jones on
Pl. 45.
4 Bac. 2
Comyn. 583

Co. Lit. 303
4 Bac. 97.
Plow. 128.
4 Bac. 2.

Co. Lit. 303.b
Hob. 234.
Latch 186.
Plowd. 202
5 Coke. 32
4 Bac. 2

Plowd
203.a
4 Co. 42.
Co. Lit. 303.

Pleas and Pleadings.

an excuse for not pleading. As a plea is an answer to the declaration alone, but a Demurrer may be taken to any part of the pleadings and by either party. As to a Replication or Rejoinder.

Rules. 1st. In ~~every way~~ any plea there are two principal requisite the first of which is the matter alledged must be sufficient in itself. Secondly it must be expressed according to the forms of law. The first is matter of substance the last mere matter of form: the omission of either is good ground of demurrer. Omitting the first is good cause of General Demurrer the last of Special Demurrer.

Rule 2d. Every plea must be direct not argumentative nor by way of recital i.e. the principal facts must be averred directly since this is essential to certainty which is a primary object in pleading.

Rule 3d. Each party's ~~plea~~ plea is to be taken most strongly against his himself i.e. If there is any repugnancy in the several parts of a plea that part which operates against the party pleading must be adapted since it is presumed that each party will make the best of his own plea case. Hob 234. Sawer 49.52.

Mere surplusage never ~~vitiates a plea~~ vitiates a plea. but repugnancy if in a material point always does. Sawer 47.

Surplusage is where a party having alledged sufficient for his cause proceeds to alledge still farther something foreign to his plea.

Repugnancy consists of two or more averments of the party's being

Remarks

(a) Immaterial averments must often be proved by the party making them or he will fail - or when they relate immediately to the point in question Seems if impertinent or foreign averments - Whenever the immaterial averment goes to the discription of the action it must be proved - Lawes 48. Doug 640. 2 Wil. R. 1104 2 Mc Nally 501. 513. 3 East -

Co. L. 200 a
Co. Lit. 193 b
1 Wh. 446.
2 H. Bla. 11
4 Bac. 100.
26 T.

Co. Lit. 282 b
Doug. 642.
Cowp. 599
Imp. K. B.
198 -

(b) Seems if Declaration or plea wants substance -

(d) Eg. Duplicity omitting proper to be cured by pleading over - Waver -

Co. Lit. 303 b
Geo. 54. 1 Ma. R.
2 Sa. 4 Bac.
2 - - -
~~Co. 143~~
~~200 a~~

(c) Suppose the plea in bar expressly avers a material fact omitted in the Declaration is not the verdict aided? Does it not appear from the whole record that the Pltff. has a right of action?

1 Rep. 54
Ld. 40
7 Plow. 65.
Bl. -
B. K. P. 289.
James 48.
Co. L. 363

Carth. 66. 4 Bac. 2
Salk. 519. 7 T.R. 25.
Ld. 120
Co. L. 363
Dent 222.
Sev 195 -
34. K. Com.
24 Geo. 94.

Pleas and Pleadings.

inconsistent with each other —

It is a general rule that every thing ought to be pleaded according to its legal operation. Thus if one joint tenant ~~should infeoff~~ covenanted to an other this ~~this~~ must be plead as a Release not as a Feoffment since one joint tenant cannot infeoff an other both being already seized of the whole — or if one should covenant never to sue his debtor the proper mode of pleading this is as a release or discharge and not as a covenant this however is not absolutely necessary since if the instrument is produced on record it must appear to the court as a release and they must take notice of it as such.

That which already appears upon the record need not be answered. And it is no matter whether was alleged directly or not —

Whatever is once admitted cannot be afterwards contradicted — ~~And~~ if both parties admit it — even a verdict of the jury cannot contradict it since the jury are only to find the facts about which the parties are at issue — 8 Rep. 4b. 4 Bac. Ab. 2 Mod. 5.

(a)

If the Declaration, Plea in bar or any other part of the pleadings wants form or the circumstance of time & place are omitted the defect is regularly aided by the adverse party's pleading over instead of demurring specially — i.e. if he neglects to demur ~~& pleads over~~ he ~~cannot take advantage of the defect afterwards~~ —

For a special demurrer is the proper mode to cure formal defects and if the adverse party omits this he waives it —

If the Deft. pleads in bar or omits to demur to a bad declaration he aids the declaration and precludes himself from taking

Remarks.

(d) New matter alledged in any stage of the pleadings must conclude with a verification — 2 Burr. 772. Quere, as to negative matter pleaded Willes R. 5 — Doug 58. Cowp 575 —

Carth 66. 7 Co. R. 25. 8 Dr. 120. Co. Lit. 303. 2 Vent. 222. Salk. 519.

If the Deft. Pleads in bar the Pltf. may reply by denying, confessing and avoiding them —

3 Bla. 310

3 Bla. 309.

3 Bla. 310.

Pleas and Pleadings.

advantage of the defect. The same holds true as to the Pltff. with respect to a plea in bar or with a Deft. again as to a Replication. Thus if the fault is duplicity the Deft. pleads the General issue the Deft. cannot take advantage of the Duplicity.

But with substantial defects no party can aid his aversary's by replying over in stead of demurring. They cannot be cured in any manner. (a) look page back) (d)

In every stage of the pleadings each party may meet the aligations of his adversary in three ways.

1st By denying them and pleading the General issue. 2d By confessing and avoiding them by new matter or 3 by Demurring.

When anything is alledged the oposite party may have an opportunity to answer it in one of three ways, whether it is alledged in the declaration or plea in bar. This may be done by either party with proper if true traverse

Hence he who pleads new matter must conclude with an averment or and not to the country. The pleadings are in the following order. The first plea is on the part of the Pltff. and is called the Declaration 2d The Defts answer or a Special plea in bar 3d The Replication of the Pltff. 4th The rejoinder of the Deft. 5th the Surrejoinder of the Pltff. 6th the Rebutter of the Deft. and 7th the surrebutter of the Pltff.

As it is the object of a plea in bar to destroy the Declaration so it is the object of the Replication to destroy the Plea in bar. And

Remarks.

The party justifying must shew and admit the fact Per Buller Justice. 3 T.R. 298.

4 Bac. 6 Co. Lit. 304. Plow. 4b. Id. Ray. 1449. 5 Com. 99. 183.

Conclusions of law need not be stated — Doug. 159. Lower 46 — for not traversable Dig. not capable of being denied —

Hob. 56. Id. 199. 8 T.R. 120. 133. 8 Co. R. 120. Id. 138b.

(g) Q. debt on bond the date of the original writ before day of payment judment would in this case be erroneous and the defects not cured even by verdict —

4 Bac. 6. 18. Co. Lit. 14a Plow. 84. Hob. 199...

(h) Quere. by Cok. as to this Example — How does the fact appear on the declaration? —

Mias and Pleadings.

any preceeding step of either party should be calculated to fortify and support his former position — As the replication to the Declaration or the rejoinder to the plea in bar.

The judgment should always be rendered on the whole record taken together. Thus altho' the parties should join in law on one point in favor of the Pltff. yet on the whole record judgment may be given for the Deft. Salk. 173.

The court will always govern its judgment by the first defect which appears — Thus if the declaration should be bad and the Deft. instead of demurring should plead over specially — If the Pltff. should demur to the plea in bar as bad he would lose it; because a bad plea in bar is good enough for a bad declaration; and the first defect was on his side —

The Declaration.

This being the foundation of the suit must shew all which is essential to the Pltffs right of action for the Pltff. cannot prove a good right of action under a bad declaration, nor any material fact not set forth in his declaration

If the declaration discovers any fact which shews at that at the commencement of the suit the Pltff. had no right of action, tho' it is well formed, yet he cannot recover on it. (9)

Yet it is very improper to say that the writ abates in such cases

Remarks.

Co. Ely. 326.
Mod. 598.
Co. J. 544.
4 Bac. 13. 44
3 Bla. 273.

Comp. 454.
4 T. R.
4. Doug. 61.
7 T. R. 4

5 Mod. 305.
3 Bla. 395.
4 T. R. 472.
2 H. Bla. 251.
or 201-
4 Bac. 8

5 Cow 27. 32.
Co. Lit. 203.
Plow. 74. 85
Cd. 122.
5 T. R. 95.
4 Bac. 8.

Pleas and Pleadings.

for that is another part of them an appropriate time applying particularly to an other part of the pleadings.

Thus if the Pltff. should declare on a bond to day and in his declaration shew that the bond was not due until tomorrow, he could not recover upon it since he must have a cause of action at the date of the writ (k) (Pg. book L)

And the declaration is so radically defective that it cannot be cured in any manner — not ~~by a verdict~~.

The omission of anything which is the gist of the action in a declaration is an incurable defect.

The gist of the action is that without which the Pltff. cannot recover or without which there is no cause of action. Thus if the Pltffs. right of action is to accrue on his performance of a condition precedent, in order to recover he must aver performance.

And in such case the Deft. may demur and it will be sufficient — or if he pleads to issue and there is a verdict for the Pltff. he may move in arrest of judgment or have it reversed on a writ of error. Doug. 658. 3 Bla. 395. 4 T.R. 472. 2 W. Bla. 206.

There is no necessity for the Deft. to move in arrest of judgment however, in order to bring a writ of error.

A further rule in declaring is that every declaration must contain certainty (ie the averments) — This relates chiefly to the mode of making averments, and the meaning is that the allegations should not be vague, loose and ambiguous for three reasons.

Remarks

(k) If the Pltff. declare on a note the day is material Plowd. 122. Cro. C. 2. 78. 97. — Cannot vary from day laid — So on a bond or other writing — Secus in cap of common aft.ns or in trespass — assault & Battery &c there the day is not material — Sha. 21. Co. 2. 283. Plowd. Com. 24. —

(220) Salk. 212. Id. 220. 1 Show. 96. 4 Bac. 8va 1 Bac. 15. Cro. E. 722. Yelv. 233. Cro. J. 654. Carth. 172.

(l) A contract not good at Com. Law unless reduced to writing must be declared upon as being in writing Salk 590 — So of an agt. plead in bar of an other action — So of a contract unknown to the Com. Law but required by stat. to be in writing 4 Bac. A. Secus of a contract good at Com. Law by parol but required by stat. to be in writing — 1 Bac. A. 780. 95. 2 Bur. 1890. Cowp 249. 6 Rep. 38. 12 Mod. 540. But. N. P. 279. 275. Ray. 450.

4 Bac. A.

Pleas and Pleadings.

1st That the Deft. may know how and what to answer 2d. That a regular issue may be formed or joined and 3rd that the court may know how to render judgment.

The Declaration must be certain as to the time, parties, time, place and subject matter, in order to furnish the meaning of the parties. (B)

Generally advantage must be taken of defects in the declaration by Demurrer and not by pleading in abatement since the last plea only reaches the writ. ~~Exception misnomer in Declaration or variance between writ and Declaration~~

Except where it has a misnomer or there is a material variance between the writ and declaration; then Abatement may be pleaded. (C)

Declarations are of two kinds. Viz. General & Special.

General declarations only state the case generally. Special declarations set forth on the contrary the particular circumstances of it. As if in declaring on Indeb. Assumpt. the special facts out of which the Assumpt. arose are not stated, it is of the first class. But if they are all set forth the Declaration is special. As if Ejectment is brot and the Pltfs title is generally stated it is of the first kind. but if his title is traced back to devise &c it is special.

The first kind are commonly used in Great Britain the last in Lou. But the last is seldom used any where except in actions on the cases.

Where an action is brought on a penal bond without declaring on the condition the declaration is General and is used both in G. B. and In Lou. Otherwise where the condition is declared on.

Remarks.

(on) In case of implied contracts it is necessary for the party declaring to state the promise as if expressly made merely stating the fact out of which the promise is raised is not sufficient it only shows the consideration — 2 Root 44. Doug. 642. Caith 665.

* unless it appear from the record that the other could not be joined as in case of death —

A different principle may be found in

1 Com. 10. 5 Co. R. 18. 19. Cr. Eliz. 164. 5 Term Rep. 651.

9 Bal. 203. 2 Str. 820. 5 J. R. 18. 1 Ros. & Pull. 67. 5 Co. 18 Salk. 290. Doug. 146 2 J. R. 766

Pleas and Pleadings

A general declaration cannot be demurred to, but the Deft. must plead the general issue or a special plea in bar. ×

A Pltff. declaring on a deed is not bound to set forth any more than is necessary for his right of recovery — yet he may not mutilate the instrument so as to give it a wrong construction —

But otherwise if the other parts of the deed amount to a condition precedent then he must set forth the whole and even performance — (m)

Of the Joinder Nonjoinder and Misjoinder of Parties

A joinder is where a suit is brot in favor of two or more Pltffs. or against two or more Deffts.

As to the joinder of Pltffs. — Where two or more persons are jointly interested in a right they may and ought to join in an action brought for its violation — And this whether in contract or tort — As Co-Obligees & Joint Tenants — Tenants in Common —

There is however a distinction between the cases of contract and tort — As where the action is brought on a contract the Nonjoinder of a necessary Pltff. may be taken advantage of under the general issue and is good cause of demurrer, or it may be plead in abatement — because the contract proved can not be the same as described in the declaration — # But where there is a ~~mis~~ joinder of Defendants abatement only can be plead — see next page at the top

~~Also~~ If a parol promise is made to A & B. and A. declares upon it alone he cannot recover in the right of B. who possesses an undivided moiety

Remarks.

Because a plea of the Gen. issue would improperly surprise the Plaintiff he not always having it in his power to know all the Defendants whom he ought to joins — therefore the Deft. must plead in abatement and give a better writ —

But where Plaintiffs are not properly joined it is their own fault and Deft. may plead Gen. Issue It can be no improper surprize

This I believe to be arbitrary —

* Scire as to libel —

4 Co. 76. Salk. 4. 290. Stra. 1146. 5 T. R. 554. or 561.

Co. Eb. 143. Hob. 13. 1 Leon. 318.

Esp. 504. 4 Bac. 10. Co. Cas. 518. B. N. P. 5.

4 Bac. 10 Co. J. 64. B. N. P. 5. Esp. 504. Bac. 15. 4 Bac. 511. Hob. 124.

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fith night.

But when the action is founded in tort, the nonjoinder must be taken advantage of in a plea of abatement only and not under the general issue. (o) As if A. & B. own a house which is taken in trespass. If A. declares for the recovery alone Abatement must be plead.

In Salk one of the cases cited is against this principle, but that has been questioned and now seems not to be law.

When the right belongs to one alone and an other is joined in a suit for its recovery, it is a misjoinder and a defect in the declaration. For tho' the Deft. is liable to the proper person he is not liable to a stranger. As if A. & B. should sue for a trespass committed on the land alone of A. alone. This may be taken advantage of in a plea of abatement and the better opinion seems to be under the General Issue likewise. but this is not clear.

If actionable words are spoken of two or more persons, they cannot join in one action. but each must sue for himself since the character of each is his exclusively and no joint right is violated.

So if two or more persons are beaten by the same person they cannot join for the same reason.

<u>As to the joinder of Defendants.</u> If two or more speak the same slanderous words of an other at the same time they cannot be joined as Defts in one action. For there is no joint act, which is essential to a * joinder. Owen 106. Cro. E. 512. 1 Com. D. 199. Palm. 313.

Remarks.

& But two cannot be sued for distinct torts committed by each severally — Stiles 152 —

(A) Pending at the same time and indeed judgment may be recovered against all — 4 Bac. 10. Latch 262. Bulo. N. P. 5. 1 Wils. 210. Hob. 6 — —

In case of contract if there are two or more joint obligees or covenantees and one dies his Executr cannot join the right of action survives to the survivors — 1 Bac. Pall. 445. 1 Lev. 497 —

(a) Slander does not stand on the same ground with Malicious prosecution Slander being a wrong much, in contradistinction to contract while Malicious prosecution is a tort — contin. on back side. Stiles. 153. 3 Bac. 697. 2 Ven. 99. Salk. 396.

(B) If two enter into a joint bond and one dies his Execr is not liable to the obligee — The only remedy being against the survivor — Secus if the bond is joint and several —

I Two or more persons may be joined in a libel for a libel is a tort as much and perhaps more so than a Malicious prosecution And so may two or more be joined in a prosecution at the instance of the public — Burn. title of libel — Zelo. 24. 4 Sid. 238. 3 T. R. 742. 3 Bac. 698.

(C) The rule is established as it is laid down but Mr Gould thinks that C. (in this case) has no rights of action whatever for B. is A's agent & not B's and C. is in no in privity to the transaction — It is supposed if goods are delivered to B. to deliver to C. that the C. must sue in trover — If money Qa. Respt Chity 220. 1 Bola Pow. 349. 359. Zelo 26. 4 Sid. 238. 3 T. R. 742. 3 Bac. 698. 1 Hen. Bla. 236. 2 Atk. 31. Chitty 175 — 4 —

(B) In this State of N. Y. however I conclude a less number than all may be sued — the words of the stat. are that all the obligors or "any part thereof of them" may be joined &c 1 Vols St. 35 — 4 Bac. g. 10. 1 Bulo. 68. Hende. 321. 1 Pow. 6. 347. 353.

Pleas and Pleadings.

But it is otherwise when two or more join in committing a trespass since all may be sued together or any number less than the whole. For this is joint or well as several and all the acts are considered as one indivisible one. 2

I So in malicious prosecution which is a tort also they may all be joined as Defts. (a) or any number less than the whole may be sued

But where two or more commit a wrong merely which is no tort they cannot be joined as defts. in one action –

If two or more persons make a joint contract they must all be joined in an action brot upon it for it is not his or any individual's contract but their's i.e. The contract of all together #

But if two persons enter into a joint and several contract each or both may be sued at the Plfts. election for it is the act of each as well as both –

But if ~~two~~ three enter into a joint and several contract the Obligee may sue each or all ~~of~~ them but he cannot sue two only as he must either treat it as wholly joint or wholly several – all the actions may be (x) (8)

And if two or more bind themselves by one contract it is accounted joint of course unless the terms imply a several obligation or duty – 3 Bac. 697. 2 Atk. 84 – 5 Bur. 2611. Chitty 175 – (5)

If A. delivers goods to B. to be delivered over to C. If B. fails to deliver A & C. cannot join in an action against him – For tho' each may has a right of action it is on different grounds – (6)

Remarks.

(a) Slander is considered a "wrong" merely while Malicious prosecution is considered a "tort" — the fact is according to Justice Buller every cause of action arising "ex delicto" is not a "tort" and he takes this distinction viz in every cause of action arising "ex delicto" there must be some positive act to make it a "tort" — Slander arises "ex delicto" but is a mere "wrong" there being nothing but words spoken no positive act committed to make it a "tort" But in Malicious prosecution there is something more than words spoken a positive act is here committed or rather acts — Altho' Slander is a "wrong" and Malicious prosecution is a "tort" still they are causes of action sufficiently of the same nature to be joined in the same suit for they are both "actions on the case" —

Comb. 244.
Rub. 160 —
4 Bac. 11.

4 Bac. 11.
4 Bac. 191.

1 Bac. 50

5 Bac. 196.
1 Mut. 366. 5
Doug. ~~662~~
65 R. 2 Wils.
319.
1 Wils 252
1 Reb. 147

Co. Lit. 20.
Id. 316.
1 T. R. 276.

1 Wils. 252.
1 T. R. 276.
3 Burr. 70 —

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Of the joinder of different causes of action in a suit

Some causes may embrace several distinct grounds or causes of action and others not

The rule is this several causes of action of the same nature may be joined in one declaration. This rule is so indefinite that it has given rise to a great difference of opinion.

The best construction which can be given to it is this; that if several causes of action require the same judgment at Com. Law they may be joined in one declaration; this holds generally tho not universally true.

At Com. Law there were two species of Judgment 1st A capiatur pro fine and 2d A Misericordia. The first is rendered on all torts with force as trespass vi et armis when the Deft. was taken into custody for a fine to the king. A Misericordia was given in all civil cases where there was a wrong without force as trespass on the case

In Com. no such distinction between judgments has obtained

Thus if A has given several notes of hands to B. and they have fallen due before the action brot, they may be joined in one action

But it is a universal rule which holds true in all cases that if several causes of action all require the same judgment at com. law and the same General Dmgs they may all be joined in one suit. Thus if B. gives to A several bonds they may all be declared upon together or each by itself singly

Remarks.

In some case where the judgments only are the same tho' the ~~pleas~~ pleas are different As Debt & Detinue Debt on bond and a loan 1 Vent. 336. Tid 11. 4 Bac. 11 Cro. 6. 20. 316. 14. 1 Reb. 847 —

8 Co. 74.
2 Bla. 48.
348. 7 Wils.
252. 2 Sd.
319. Doug.
652. Comp.
230 — 230
1 Vent. 223.
4 Wils. 252.
2. Ds. 319
~~4 Bac. 12~~

Hob. 249.
4 Bac. 12

Hob. 249.

Co. Car.
316. Co. Car.
20. 1 Reb.
147. 1 Vent.
366. — —

1 Bac. 21.
1 Mod. 42.

Pleas and Pleadings.

So if there are several trespasses vi et armis committed by the same person each may be sued for alone or all may be ~~sued~~ joined in one declaration.

So several trespasses on the case arising ex delicto may be joined; as Tho= =ver with mere neglect of both since in these cases the Judgment and Plea are the same. So Trover & Slander ~~in the same~~ may be joined. So Slander and Malicious Prosecution may be joined together.

But can Ejector and Assault & Battery be joined in one action? since the proper action to the first is Ejectment and to the last trespass vi et armis. This question has been much ~~adgitated~~ agitated but Mr. G. thinks without any good reason since it is apparent in all the Modern Reports that the judgment and plea are the same in both.

In Cov. the general issue is not the same in Ejectment as Dep[illegible]. yet Judgment is the same in both.

It may be observed that the Stat of Ed. IV did away this distinction be= =tween the judgments in C.B. still the difference is kept up between the causes of action as formerly; for the Plff. now pays a duty fine in the nature of a duty when he takes out a writ sounding in trespass vi et armis.

It is a general rule that a difference of plea makes no difference with re= =gard to the di joinder of different causes of action.

In Cov. Mr. Gould thinks that we ought to preserve all these distinct= =ions as in C.B.

The action of account cannot be joined with any other cause of action in the same declaration.

Remarks.

Salk. 10—
1 Bac. 21.
1 Mod. 46.

5 Mod. 90.
Jerk. 211
T. Ray 233
2 Ben. 117
23. Ry. 5 B.
Carth. 184.

4 Bac 11.
Salk. 10
Carth. 456.
—436. 2 Lev.
99—

Pleas and Pleadings.

So trespass and contract cannot be joined – Debt and account tho' both founded on contract cannot be joined – the pleadings & proceedings are all different.

So trespass and trespass on the case or deceit cannot be joined since the issue of the last is not the same ~~of the first~~ with the first – Vent. 356.

Where the judgments are different there can never be a joinder and a fortiori where the plea and judgment both differ there can be none –

But where the judgment and plea both differ on the same to several causes of action they may always be joined –

And where the judgment is the same but the plea or general issue is ~~the same~~ different yet the causes of action may sometimes be joined –

Joining several causes of action which cannot be joined as trespass and debt or tort and contract is fatal to the declaration – even verdict cannot cure it and it may be taken advantage by demurrer or by moving in arrest of judgment – ~~but this is distinct from it~~ duplicity

But this is distinct from duplicity. Since duplicity is a mere formal defect and can only be taken advantage of by special demurrer – Whereas this consists in inserting tort and contract together – The real distinction between them is this --

<u>Duplicity</u> is when a party inserts in his declaration a cause of action sounding partly in contract and partly in tort which all go to make up one indivisible ground of recovery –

<u>Misjoinder</u> is when the party inserts distinct causes of action

Remarks.

(a) Decided in Sup. Ct July 1802 in Philips and Ludlow vs Boget that the Court would not compell the Pltff to consolidate several suits brot on several promissory notes by same Pltff. vs same Deft - for the reason may be different claims P. 134.

2 Wils 303.
Carth. 113.
2 Wils. 313.
3 Wils. 20.
3 T.R. 292.
W. Bla. 582.
2 T.R. 167.
Stiles 43.
202.

Comb. 244.
1 Lev. 111.
2 Term 690.
2 Stra. 1149.
Id. 1178.
2 T.R. 659.

Pleas and Pleadings.

for the purpose of enforcing distinct grounds of recovery — Thus if one sings on a contract declares that the Deft. may demur specially on the ground of duplicity.

But if he should sue in Assault & Battery and on Debt in the same declaration — If judgment is rendered in favor of the Pltff it may be reversed ~~in favor~~ on the ground of misjoinder for it is a fatal defect.

Trespass & Trespass ex delicto cannot be joined; yet if one breaks a door and destroys goods and beats the servant of the house he may declare in trespass for the breaking and trespass ~~foregoing~~ per quod servitium amisit tho' the last is properly case — because the consequent damage is a mere aggravation of the original trespass — He might either join them or sue for beating the servant in a separate action. And this is no infringement for the foregoing reason of the just and established principle that trespass and case cannot be joined. When a Pltff. brings several actions for several distinct causes of action of the same nature the court in its discretion may compel a consolidation of them into one. But this power is merely discretionary, and a motion for this purpose is an appeal to the discretion of the court.(a) There is no rule which obtains respecting this, but Mr G. trusts that the court would never grant such a motion unless the Deft. declares that his plea is the same to all — As this would be subjecting the Pltff. to great inconvenience.

Remarks-

¶ Much learning is to be found on the subject of precedent & subsequent conditions in 1 T.R. 638. in the case of Hotham vs East Ind. Comp.

1 T.R. 611.
4 Bac. 12.
Co. E. on Co. Lit. 325.
Hob. 179. 180.
Ja. & Jac. 44
44. or 134.

7 Co. 10. 5 Coub. or
45. 1 T.R. 645.
7 Do. 125.
2 W. Bla. 374.
4 Bac. 12. 13.
~~4 Rep. 14~~
× 5 Com. 45
1

(c) declaring in case is a fatal variance — Hob. 180.

4 Bac. 16
7 Co. 12 Eb.
300. 1 Wm.
Doe ~~554~~. 2
Do. 574. 1 T.
R. 638.
4 Term. 65.
~~Coub.~~
14. b. 254

4 Bac. 16.
2 Mod. 301.
Co. J. 645.
Coub. 265.
Hob. 84.
5 Co. 10.
1 Pow. Con.
359.
~~3 Hob. 137~~

1 Pow. Con.
359. Hob. 84.
5 Co. 10. a

5 Bac.
345. Sed
vide —
1 Wilb. 992. Wilb. 203.
Ex. J. 316. where —
it is said that advantage must be taken of it by
special demurrer —

Co. Lit. 303
Co. J. 361. 2
2 Salk. 636.
4 Bac. 2. 22.
97. 5 Com. 45.
2 Lev. 206.

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Miscellaneous rules respecting Declarations.

The declaration should always agree with the writ for the writ is the foundation of the proceedings, since it is that which gives the court authority to hear the cause. ~~Thus if the writ entitles~~ action Respass (o)

When the Pltfs right of action is to accrue on the performance of a condition precedent he must aver performance and the omission of this is fatal and cannot be cured by verdict.

But where the Pltfs right of action is ~~[illegible]~~ qualified ~~it is qualified~~ by a condition subsequent he is not bound to take notice of the condition it is matter of defence & the Deft must plead it.

So if the action is brought on a contract in which are reciprocal (ie independent) promises or covenants the Pltff need not aver performance of them on his part. Thus if A. promise to pay B. money in consideration of B's promise to perform labour B. may sue for the money but need not aver performance on his part for the consideration of the money is the promise of B. — 3 Bulst 187. 1 Lev 393. Hob. 881. 1 Vent. 177. 1 Pow. C. 359. 5 Rep. 10.

But where the covenants or promises are dependent on each other, he who sues the other must aver performance on his part. Thus if A. promises to pay B. money on his performance of labour B. must aver the performance to recover the money.

Those facts which constitute the gist of the action must be expressly and positively alledged. Thus if A. in Assault and Battery should declare against B. that "whereas ~~Deft~~ Deft assaulted &c." it would be ill for the General

Remarks.

(x) Ex. consideration in assumpsit — possession in trespass — Seizen in certain cases. 4 Bac. 13. 16. 22. Cro. C. 116 —

(6) because 1st they are not transmissable. 2d they are not the substance of the action — 4 Bac. 13. 14.

10 Co. 77. Hob. 5. 1 B. Plead. Appt. 10. 4 Co. 86. 184. 1 Com. 208.

Decs. need state no more than is necessary than to entitle Pltff. to recover Cowp. 665. (outer)

Peph. 174. Yelv. 40.

(7) The object of this rule is to enable the Pltff. to discover for what particular thing he is sued and to plead one recovery in bar to a second action brot for the same property —

4 Bac. 24. 3 Bac. 272. 2d. 273. 5. Co. Ry. 34. Salk. 624. Stra. 634. Cro. Eliz. 866. Stiel. 25. Cro. J. 417. L.d. Raym. 544. 2 Show. 433. Cro. J. 664.

Hob. 178. 10 Co. 115. 1 Ro. 1056 Yelv. 45. 1 Ro. 375.

Pleas and Pleadings.

Issue would be absurd "not whereas" &c. nor verdict cannot cure this defect, it is sub=stantial.

But this rule does not hold as to facts which are not traversable by plea however essential they may be. (x)

~~A~~ Possession cannot be ~~pleaded for it~~ traversed for it would a=mount to the General issue. Therefore it is brought in by way of recital.

~~But~~ Nor does the rule hold as to mere matters of inducement or any immaterial parts ~~this rule does not hold~~. i.e. such matter need not be positive alledged. (6)

It is however our practice in law. to declare every fact whatever expressly and propitiously tho' this is not the most lawyerlike manner.

The thing sued for must be described with convenient certainty so far as the nature of the thing admits generally, tho in some cases a less degree of certainty is required.

It is said to be sufficient if from the Description the Jury can learn what is ment. Thus in Eng. the meets and bounds of a field are not described as in law. but merely the place where it lies &c.

It has also been holden that Trover brought for "a ship and sails" was a sufficient description but this is quite too loose and vague — so for "a library of books" was held sufficient. Tho' Trover brot for "some fish" or for "seven pieces of linen" was held bad — the decisions are some what arbitrary — 1 Vent 53. Salk 654. Sir Ray. 1416 — (7)

If the declaration is good in part and ill in part the Pltff. may recover on that part which is good unless it be for an entire & indivisible demand

Remarks

(8) for when the demand is entire if the deterioration is ill in part an immaterial it is so in toto for all the parts (except mere surplusage which cannot vitiate) are necessary to constitute one cause of action —

1 Roll. 764-5 — 2 Saw. 103 Ray. 395. Burr 1235 —

(9) For exceptions to this rule Vide 4 Bac. 26. Moore 87.

2 D. Ray. 814.

Stra. 1098.
1 Bur. 385.
4 Bac. 512
B. N. P. 8.
10 Co. 130.
3 Wils. 177.
Salk. 88.
1 T. Ra. 594
Ve. 592.
Ab. 178. 175.
2 N. P. 318
2 Bac. 7.

4 Bac. 22
Hardr. 58.
T. N. P. 107
Moore 2 B.
2 Bulst. 280.
Stub. 364

Espi. 304.
2 T. Ra. 112.
2 T. Th. 123.
Stra. 175 1 Rol. A. 785

Pleas and Pleadings.

Thus if one declares on a bond already due and one which has not fal=
=lin due, if the Defdt. Demurs the Pltff. may recover on the first — 2 Show. 433. 4 Doe. 25. 26.

But Mr Gould thinks that when the declaration is on one entire and indivisible demand, if it is ill in part it must be throughout thou=
=ght — for if it is defective in any part, the declaration itself must be bad. (8)

But tho' there are two or more distinct demands, one ill & one good yet if a general ver=
=dict be given for both with entire damages the judgment ~~must~~ will be arrested, unless the amount of each appears upon the record — Thus in an action for slander for two distinct sets of words, if one part is bad and verdict is found entire. Judgment must be arres=
=ted for the court cannot determine how much was given on the false ground — or as in the case of the two bonds before mentioned.

But if the Jury had severed the damages, Judgment may be taken for the good and the other part must be omitted —

If the Jury should assess greater damages than the Pltff. demands — he may release the excess and take judgment for the residue. Other=
=wise it will be arrested. But the court may ex officio give judgment for what is demanded without a Remittitur —

So if the Pltff. demands more than by his own shewing is due and the jury find the amount of his demand. He may take what is shewn to be due and must remit the remainder, or the judgment will also be arrested here — (9)

Remarks.

(a) For forms see Story's Pleadings 7.8.9.

(10) This law recognized here by Stat. 1 Vol. 357.

3 Pla. 330.
308

3 Wh. 51. 54
3 Pla. 302.
1 Com. 2
4 Bac. 35.
51.

Pleas and Pleadings.

The pleadings which follow the declaration are on the part of the Deft and consist first of—

Dilatory Pleas.

Dilatory pleas were so called because they were formed merely for the purpose of delay without any regard to truth at their commencement. And if an issue in fact was taken on them it went to the Jury.

But now by Stat. 4 & 5 of Ann no dilatory plea can be admitted without an affidavit of its truth or of some matter or circumstance which will induce the court to believe it is true — (10)

In Con. we have no necessity for such a stat. as these sham pleas have never been fashionable in this state —

But we have a stat. declaring that dilatory pleas shall be tried in a certain number of days from the opening of the court (before the trial) and there take the first place in our dockets tho' the stat. is not strictly adhered to yet if this is demanded they must be so dem tried —

Dilatory pleas are of three kinds Viz.

1st Pleas to the jurisdiction of the court

2d Pleas to the disability of the pltff.

3d Pleas in abatement.

I. Of Pleas to the Jurisdiction of the Court — (a)

The causes which give birth to this plea are various as 1st Some priv-

Remarks.

In pleading to the jurisdiction you only make half a defence i.e. "defends the wrong and injury" but adding "when &c" gives Court jurisdiction Co. L. 127 – Imp. K. B. 41. – This has been over ruled Alexander vs Gresham Willes R. 40. & in Wilks vs Williams 4. T. R. 135. where the Court held that the "&c." would im= =plie only half defence where such defence was to be made & that it would be understood as mea= =ning a full defence where that was necessary see also Story R. 3. –

1 Com. B. Leith. 354. 11. 3 Bla. 34. Salk. 544. & 3 Bla. 401. 1 Bac. 5. 2 Bulst. 207. 4 Bac. 36. 35. 1 Rott. 152.

In every plea to the jurisdiction an other jurisdiction must be ~~plead~~ stated – Comp. R. 172 –

1 Want. 332. 10 Co. 68.

10 Co. 76. Ed. Ry. 224.

Pleas and Pleadings.

=ilege of the Deft as that he is an attorney in an other court is a good plea to the jurisdiction in Eng.; but in Lou. no such distinction obtains be= =tween our attornies. In G.B. the attorney is as much an officer of court as the judges, and is not suable in an other court than his own unless the subject of the suit is exclusively in an other court.

2d. Where the jurisdiction of the court is limited it is a good plea that the cause of action arose out of its jurisdiction — As to our city courts in Lou. Story. 7.8.9.

3d. So if the court has no jurisdiction ~~of~~ over the subject matter this is a good plea but it is not necessary to plead this particularly — since all the proceedings in such case are coram non judice and void and the court will dismiss ~~them~~ the cause ex officio — Story. 8.

In such case the judgment if any rendered is not only voidable but strictly void and every person who proceeds to execute it is a trespasser.

To determine when it is proper to plead to the jurisdiction and when not observe the following rule.

Where the want of jurisdiction goes merely to the person of the Deft. or to the local limits of the court it must be plead —

But where the want of jurisdiction goes to the subject matter it is not necessary to plead it. For in the first instance if the Deft. does not plead he waives all advantage to be derived from it — In the last the court are bound to notice it ex officio. Vide title "False imprisonment" for authorities

4th. But that the cause of action arose in a foreign country is no

Remarks.

× for here the proceedings are coram non judice and false imprisonment will lie.—

(o) For liability of Pltff. who sues in a Court not having jurisdiction Vide "False imprisonment" and malicious prosecution.—

Comp. 161.
170. Comp.
185. 1 Th. Bla.
146. 2 Th. Bla.
161. 145.
162.—

Ricky. 25.

4 Bac. 28. ×
35. Burr. 39.
1 Com. 5.
6. Lit. 192.
Hob. 164.
4 Bac. ×

6 or 1 Mod. 146.
3 B. C. 303.
4 Bac. 35.
Gill C. P. 187.
Grupy R. B. 256
Bavis notes 190

3 Bla. C. 303.
4 Bac. 35.
5 Mod. 145.
Carth. 368
Salk. 298.

objection in transitory actions to the jurisdiction of a court. As if A. & B. con=
=tract in Q.B. and both come to Lou. the contract will be enforced. Story. J.

Personal actions are generally transitory; and Mixed actions are local – The first follow the persons of the parties. Whenever the judg=
=ment acts in rem the action is mixed – Penal statutes tho' of civil in their nature are strictly local.

A distinction in Lou. mitigates against this principle; it ap=
=pears to be without reason and our courts would not now listen to it a moment –

A plea to the Jurisdiction is regularly the first plea in the order of pleading by the Deft. For by pleading any other plea when this is necessary but where that court has not jurisdiction over the subject matter it is not necessary to be plead, he waives it. Since it is absurd for the Deft. to beg the court to decide upon his issue when he intends to ~~decide that~~ declare that they cannot decide at all.

But where the court has no jurisdiction over the subject mat=
=ter it cannot be waved tho' the deft. expressly agrees to it.

In Q.B. this plea is signed by the party himself and not by his attorney; because as the last is an officer of the court he is supposed to sign it by leave of the court, which it is said allows the plea.

But in Lou. the attorney signs this as any other plea – A plea to the jurisdiction concludes to the cognizance of the court "Where=
=fore the said D.B. prays judgment whether the court will have ~~jurisdic~~ the cognizance of such suit" &c not like plea in abatement. – (c)

Remarks.

(a) Quare Is not the true reason this, that as the Court have no jurisdiction over the ~~subject matter~~ cause they of course ~~have no it~~ have no jurisdiction over any matter or circumstances relative to the ~~subject matter of the~~ cause —

1 Rom. 6. 3
Bac. 761.
3 Bac. 762.
Sitt. 197.
Co. Lit. 128.a
1 Bac. 2.

4 Bac. 85.

Co. Lit. 128.b
3 Bac. 762.
1 Inst. 125.a

Pleas and Pleadings.

In Lou. where this is pleaded and the plea is supported costs are taxed - But where the cause is dismissed *ex officio* no costs are allowed because no judgment is given. But if judgment is rendered on the plea the S. C. have thought it right to tax costs. Mr G. thinks otherwise - This allowance of costs is to prevent the Deft. from bringing his suit for them. But how can this be a bar when the costs taxed would be no rule of damages - (a)

II. Of Pleas to the disability of the Pltf.

In G.B. there are very numerous but in Lou. they there are not many.

1st In G.B. Outlawry of the Pltf. is a good plea. This is likewise a good plea in all the U.S. where the English practice prevails. In Lou. we have no such thing as outlawry.

Outlawry until reversed or pardon obtained is a good disability because the outlaw is so far out of the protection of the law, that he cannot enforce his rights in a court of justice.

This however does not strictly abate the writ. It is only a temporary impediment which continues till pardon or reversal, and then the Deft. must plead to the same writ -

This disability however extends only to such suits as the Pltf. brings in his own right; but not where he brings one in the right of an other. As Exut. &c. Because Outlawry is generally a punishment and here it would not punish him but others -

Remarks.

(b) here the right is not forfeited even by felony) so when the action conveyer his goods if they are not forfeited —

1 Com. d. 6.
Lutw. 1604.

Roy. v. Rd.
6 Co.
3 Bac. 761.

Co. Lit. 123 b.
Bye. 227.
3 Bac. 761.

3 Bac. 764. 1
4 or 1 Bac. 14
5 Co. 109
7 Do 79. or 29
1 Swt. 126
Dyre 224.
Co. L. 29. 128.

2 or 3 Bac. 319.
7 Co. 63.
1 Roll. 883.
1 Bac. 8.
Co. Lit. 133.
4.

8 Co. R. 96
2 Bac. 320
or 320. 8
Co. Lit. 133.
Co. Lit. 134.

Co. L. 29. 1 Bac 483. 1 Bla. 377. 2.
6. Rd. 28. 1 Do 4. 2 Sta. 1082
4 Do 36. or 10. Rd. ..
1 Com. 7. Comb. 171..
134 2 Bla. 384.
2 H. Bla. 162.

Pleas and Pleadings.

But the Buttawry of a testator may be plead against an action brought by his Exr., As the disability goes to his own right. Since he could not transmit to an other the right to prosecute a claim which he himself could not enforce.

But tho' Buttawry is a disability in the Pltff. yet it is no plea for the Deft. as he may be sued tho he is outlawed.

The Buttawry of the Pltff. is always pleadable as a dilatory plead sometimes in Bar. The rule of distinction is this — When the cause of action is forfeited by ~~Ou~~ Buttawry or for felo. felony it is pleadable in bar as well as a dilatory plea. that is whenever the action concerns his ~~plea~~ goods. chattels. lands ~~Ten~~ or tenements. They being forfeited. But when the cause of action is not forfeitable for offences this can be pleaded only to the disability of the Pltff. and not in bar — Even if he is a felon. as in the case of Bat & Battery when the Damages are pecuniary for (c)

2d. Excommunication in Eng is a disability. This prevents the Pltff. from suing in his own or in an other's right as he is supposed to be unqualified to dispose of goods in prior usus, which was formerly done by Exr. & Adm. and this rule holds now in Eq. B.

This plea does not abate the writ but merely discharges the deft. sine die liable to answer to the same writ when absolution is obtained by Pltff.

Absolution is the only good replication to this plea here again we see how dilatory pleas differ from pleas in abatement —

3d. Alienage is in many cases a good plea to the disability of the Pltff. An Alien if not naturalized or made a denizen of can maintain no action real or mixed not even if he is an alien friend.

Remarks.

(a) Example A an Engl. man is captured by a French-man the Eng. man agrees with and actually gives to the French-man a ransom bill for a thousand pounds — and then the French-man is afterwards taken and carried into Eng. he can there maintain an action on the ransom bill given him —

Stra. 1082.
Cowp. 141.
3 Bla. 374.
2 H. Bla. 168.
1 Bos & Pull. 163
6 T.R. 29. Doug.
619. a 626 &
6 T.R. 49 — 23.

Doug. 619. 625
Cowp. 161.
3 Burr. 1794.

Sd. Ray
282. Salk.
46. Stra. 1082.
4. T.R. 166.
1 Bac. 4. 84.
Fortesque 221.

Pleas and Pleadings

An Alien can hold no land and hence it is absurd to allow him to enforce what he had no right to. But an alien friend may maintain personal actions.

It is a general rule that an alien enemy (as a prisoner of war &c) can maintain no action whatever. This is however not an universal rule, but is founded on a state policy because the recovery of their debts tends to strengthen their adversaries and to enlarge their resources.

But an alien enemy may maintain an action on a ransom bill by the law of nations — even tho' he be made a prisoner with the hostage. (a)

Certain contracts must be made between nations enemies at war (as treaties, flags of truce &c) This however is the only exception in favor of individuals of nations at war.

But can an alien enemy recover on this ransom bill, if the hostage is taken as the hostage is the pledge.

A celebrated and interesting ~~and interesting~~ case is reported in Coup. 161. where it was contended that no recovery ought to be had, because the alien enemy who brot the action was a prisoner of war himself — that the hostage and ransom bill itself were both retaken and therefore no longer the enemy's property. But Sir Mansfield in a learned argument overruled every objection and decided in favor of the alien enemy.

So also an alien enemy residing here under a license or protection or coming under a safe conduct from Government — is quo ad hoc a member of the state and may maintain personal actions.

But a question has arisen whether an alien enemy having come

Remarks.

The Rule Mr Gould thinks ought rather to be that the alien enemy should not be considered as an Exr. or he should be allowed to sue as Exr. if he is allowed to be considered as such.

638
Co. Lit. 142. n
Id. 683.
1 Bac. 84.
Co. L. 684.
L.D. Ray. 282
1 Salk. 46
Co. 6. 9.

Co. Ow. 2a
8. 1 Bac. 84.

3 Bla. 301.
1 Comy.
4 Bla 380
4 Bac. 36
148.

4 Bac. 39. 44
7 Co. Lit. 192.
1 Bla. 448.
1 Com. 9
3 T.R. 63 n 9

Cath. 124.
3 T.R. 691.

~~4 T.R. 766.~~
6 T.R. 766
a 761

1 Bla. 816.

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of those qualifications of residence can maintain an action in auter droit as Exr. or Adm. If he cannot sue then no one can sue for Exr's assets. He clearly cannot sue in his own right but he may be a lawful Exr. Still if allowed to recover he might be allowed to carry them to a foreign country and contribute to the enemy's resources. The question is not settled. But an alien friend (he is in the character of trustee) as Exr. may hold without doubt leases and of course sue for them.

4th Premunire - Popish Recusancy - Attaint of Felony. And being a Monk professed, are all disabilities in Eng. but as they are not known of ~~them~~ in our law nothing will be said of them.

In some of the U. S. however there is attaint for Treason & Felony - but it is not certain that in those states this is a disability. At any rate it can be of little consequence to us.

5th Coverture of a female Plff. is pleadable to her disability - that is when a married woman sues without her husband. But she can well sue if he joins in the suit. Story 13. &c. -

Coverture must be plead in abatement as a dilatory plea if plead at all. This rule however is general since it is a general tho' not an universal rule, that whatever may be taken advantage of under a dilatory plea cannot be taken advantage of in any subsequent stage of the proceedings -

So if a feme sole having commenced a suit marries pendente lite this is pleadable to her disability. The reasons of this principle are given at large under the title "Baron & Feme.

6th Infancy of the Plff. if he sues and appears without his guardian

Remarks

3 Bac. 148.
9. 3 Bla. 301.
Co. Lit. 130 b.
Cutt. 128.
1 Roll. 287.
Palm. 296

3 Bla. 308
309.

Co. Lit. 194 b.
4 Bac. 35

3 Bla. 301.
1 Bac. 15.
Salk. 294.
Cutt. 142.3

Pleas and Pleadings.

or next friend is pleadable to his disability. Story — 12 — 13 —

Infants are not deemed capable of appointing attornies or their powers of attorney are not only voidable but absolutely void.

There are the grounds to the of pleading to the disability of the Pltff. Plea to the disability of the Pltff. conclude to the person of the Pltff. that is conclude with praying judgment "if ~~that~~ the said Pltff. ought to be answered

III. Of Pleas in Abatement.

The word "Abatement" denotes destruction or prostration as used in Law as Eg^t abating Nuisances &c.

Plear in Abatement generally extend to the writ only and not to the count, which is reached by plear to the action. But this is not universally true.

In Lou. there is not the same distinction between the writ and declaration as in Eng.—

A writ in Lou. is that part of the record which precedes the statement of the cause of action. The date, signature, recognizance, certificate of the duty and the direction to the officer to make due return - are likewise all parts of the writ.

The statement of the cause of action is the whole of the declaration except that the date is common to both writ and declaration - The word "Wherewpon" commences the declaration.

Remarks.

Plea in abatement cannot be plead before Deft. appears Imp. K. B. 253. — Said that plea in abatement ought to be filed not delivered 1 T. R. 278.

3 Bac. 624.
3 Bla. 301. 2
1 Com. 86. 87
4 & 5 Mod. 82.
144. 1 Bac.
E. 50 —

Plea in abatement cannot be plead after Gen. imparlance 6 T. R. 369 —

3 T. R. 184. 6.
5 De. 487.
1 T. R. 278.

Salk. 7.
3 Bac. 624.
1 Sid. 247.
6 Mod. 105
3 Bac 617.
264
Co. Cas. 371.
6 Mod. 105.
Carth. 14.
3 Bac. 617.
4 Ve 38.
3 Bla. 302.

6 Mod. 85.
3 Bac. 618.

1 Com 28.
2d. Ry. 1014.
3 Atk. 902.
Comb. 65.

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It is universally true that the plea which goes to the writ only is a plea in abatement, but not e converso that what does not go to the writ only is a plea in abatement not a plea in abatement, for if there is a misnomer in the Declaration abatement may be plead.

Dilatory pleas are never favored, hence great accuracy and precision are required in pleas of abatement and the least inaccuracy is fatal.

The causes of pleading in abatement are very numerous both in Eq. & in law.

I A misnomer of the Plff. or Deft. or want of addition is a good cause of abatement and this whether in the writ or declaration.

So also in Eng. an omission of the Defts addition is a good cause of abatement. This is the Defts "Title", "Trade" "State," "Degree", "Office", "Profession" "Place of abode" which must all be added to his name by way of discription or it is pleadable in abatement under the the stat 1 H 5th called the stat. of additions.

This stat only relates to personal actions, appeals & indictments, But not to real actions since the notoriety of his possession is supposed to identify the Deft. sufficiently.

So also a mistake in the defts addition is good cause of abatement as calling a shoe maker "Ergo."

The mode of pleading a misnomer is not in the common form but the Deft. gives his true name and then pleads &c.

In law. the only addition which is necessary is the place of abode

Remarks.

(c) for he may if he pleas admit himself to be the person mentioned in the writ —

2 Vent. 34.
Carth. 301.
Id. 302.
3 Bac. 620.

Cro. Eliz. 888.

Sutw. 36.
4 Bac. 38.

2 Hale. P.C.
177.-

8 Co. R. 159.
Carth. 96.
3 Bac. 626. 6
Ld. R. 1016.
Sutw. 36.
4 Bac. 38.
1 Com. 79.
8 Co. R. 159.6
1 Com. 79.

3 Bac. 617.
1 Com. 15.
Comb. 189.
1 Roll 469.

8 J. R. 514.
Rich. law,
369.
3 Bac. 624
8 J. R. 515.

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in ordinary cases of the Deft. But when one is sued in his official character ~~[illegible]~~ or civil character and this is the inducement to the action, this must be added as at com. law. As Exr. Sheriff &c this rule is the same as in C.P.—

If the addition is by way of inducement it is mere surplusage and does not vitiate the writ.

The misnomer of one of several defendants tho' pleadable in abatement by himself is not so by any of his co defendants. For he may waive it if he will—

This rule holds with respect to criminal prosecutions also.

If two persons be sued and one of the two be misnamed he who is misnamed may abate the writ yet the abatement will not extend to the other where the cause is several but where it is joint, if it is abated as to one it is thought it must abate as to the others also. This however is a disputable point. 4 Bac. 45.

At com. law (before the stat. 1 Hen. IV.) it was not necessary to give the deft. any addition except in the case of being sued in some civil or official capacity character ut supra, unless he were a Knight or of as high a degree— And if the Pltf. were a Knight or any higher dignity or degree he must also have given himself his title—

If the deft. plead a misnomer mistake or want of addition he must give the Pltf. (as the expression is) a better writ that is he must correct the Pltf. by setting forth his true name or addition— for if he does not his plea is demurrable—

Remarks-

(a) why may not this be done in Eng.? 3 Bac. 616-

Salk. 627.
4 Mod 244.
347. 3d Ray
118. Da. 249.
4 Bac. 38. n 58
3 Bac. 624
Sd. R. 429.

Carth. 124.
6 T.R. 766.
766. Comb.
118.

Stra. 1218.
1 Bulr. 216.
Dyer 273
3 Bac. 616

Doug. 279
3 Bac. 616
Co. 2. 3.
5 Ra. 43.
Stra. 1218.

Stra. 1218.
3 Bac. 625.

8 T.R. 508

Pleas and Pleadings.

In Lou. the Deft. need only set forth his place of abode, as that is here the only necessary addition—

A Deft. who is wrongly named must also aver that at the time of the purchase of the writ he was called and known by the name of J. S. which is his right name. Spiner. 629.

A misnomer or misdescription (as such) is regularly pleadable in abate=ment tho' the rule is not without exceptions and hence the mistake is waived by any plea to the action. For it is a general rule that the Deft. will not be allowed to assign for error what was pleadable in abatement.

If one executes a specialty by a wrong name, he must be sued by such wrong name, and the Execution must pursue the writ, but his right name may come in under an "alias".

In Lou. we see him by his right name and aver that he executed the instrument by an other name. (a)

Formerly it was thought that if the mistake was in the christen name it was fatal but if in the surname it was not. This grave distinct==ion has not obtained in Lou. and it is thought would not now be considered as law in Eng.

A Deft. is not obliged for his own safety to take advantage of a misnomer or want of addition for if he be afterwards sued again for the same cause he might plead in bar that he is "one and the same person" of whom the former recovery was had. The same rule obtains in criminal cases—

Remarks.

(x) giving the fine as A.B. & Co. seems not to be sufficient 3 N.Y. 7. R. 170 —

1 Com. 14.15.
3 Bac. 617. ~~Ab~~
Dr. 618 or
6. 8. —

(6) but it answers no purpose for the prisoner is not discharged but imprisoned again while in custody —

6 Mod. 85.
1 Show. 392
2 Roll 469 or
409.

4 Bac. 38
Cro. C. 104
1 Sid 40.
2 Hawk. 185
3 Hawk 357.
2 Hale 176.
238.
1 Hale 243

~~2 Hawk on~~
~~Hawk 176.~~
~~2 Hy. 1 Hale.~~
~~Hale 343.~~
~~2 Hale 176.~~
~~238.~~

1 Sid. 140.
1 Com. 193
4 Bac. 39
1 East. 182

Pleas and Pleadings.

A mistake in the addition of the stature of the Pltff. is not pleadable in abatement, unless he were a Dwarf or as high in rank, that is (except at com. law) for the stat. 1st H 5th does not extend to Pltfs. and as the Pltff. appears in court he will be sufficiently well known otherwise. Yet the misnomer of the Pltff. is pleadable in abatement.

Matter of abatement if taken advantage of abatt must be plead in abatement except in an action on a note, bond &c. A misnomer or it works a variation may be given in evidence under the general issue yet here it is to be observed, it is not taken advantage of as a misnomer but as a variation.

A misnomer in the Declaration is also pleadable in abatement as well as well as in the writ.

In law a mistake in the Pltfs place of abode is good cause of abatement since this determines the jurisdiction of the court. the Defendant gives the addition of Pltff.

At com. law a misnomer was not pleadable to an indictment for Felony, as the person of the criminal standing at the bar with his uplifted hand was made sufficiently certain. But by stat. 1 Hen 5th It was pleadable to indictments (6) as well as to civil process.

The writ should always describe all the Defts. by proper names except when a corporation is sued. Thus when Co partners in trade are sued all their proper names should be inserted and then the description of the Firm &c in order to prevent all mistakes in such proceedings. (x)

II. Coverture of the Deft. is good cause of abatement. If a Feme Court be sued alone and do not plead in abatement her husband may ~~do it in many~~

Remarks.

× cause removed after marriage by habeas corpus. Pltf. must declare in the court above against both hus. × wife —

Salk. 400.
4 Bac. 439.
Salk 24
33 R. 631
5 32 641
4 Bac. 10.39.
Salk. 400

Exp Dig. 324 22b.
Shaly. ~~808~~
811
1 Bac. 9-10

Ens J. 323.
4 Bac 40.
Shaw. 811.

1 Inst. 89.
135. 3 Bac
149. 5 Co. 53b.
3 Bl. C. 434.
427.

Ruby 174

1 Com. 56. 55.

Pleas and Pleadings.

appear and plead it in bar in any stage of the pleadings and if he may neglect it he may afterwards reverse the judgment by a writ of Error coram ~~vobis~~ nobis - 2 Roll R. 53. Stat 254.

but if the wife were a party to the plea her plea of coverture it is said must be plead and within the time and rule of pleading in abatement but this again is doubted - for according to the opin of some she must plead her coverture in bar.

But if a feme sole be sued and marry pendente lite the suit does not abate and in which case her husband cuje her husband cannot take advantage of her coverture and it would be manifestly unjust that she should be able merely by her own act to divest another of his right. Ed. Ry 1825.

A Deft. cannot plead in abatement that he is an infant tho' sued without his guardian. If in such case the infant has no guardian the court will appoint him one ad litem or if he have a guardian he may pray to have him summoned in.

So the Pltff. may have this done which will be to his advantage as judgment would be nonsuit if he recovered against the infant solely or without notice to the guardian.

So in ecc. where the Deft. has a conservator who is not joined with him in the suit, the court will on motion by either party give time to summons him into court. If the conservator fails to appear, it is not certain how the court would proceed to render judgment they probably would appoint a species of guardian ad litem in order to proceed regularly.

III. If there be but one Pltff. or deft. the death of either pendente

Remarks.

(1) No exceptions in real actions because by the death of one of the several Joint Pltfs in a real action the extent of the survivors right is increased but in the writ he sues for his original part only - 1 Bac. 7. 8. 10 Rep. 134. 6 R. 26 -

10 Co. 134.
Co. 139.
1 Bac 40. 1
6 Co. 26.
1 Bac 7. 8.

At Com. Law if one of several Pltfs. died after verdict and before Judgment the rule was the same and Judgment would be arrested Ray. 463.

3 Mod. 294.
Ray 463

Co Litt 149
1 Com. 567.

1 Com. 54. 5
4 Bac. 42.
2 Mod. 113
Stat. Con. 22. 3

Ideas and Readings.

lite abates the writ at Com. law. But where there are several the following are observed. In all real actions if one of two Pltfs. the writ abated at Com. law. But in personal or mixed actions if one Pltff. died after being summoned and severed it is otherwise. (x)

A summons and severance is where one of two persons having a joint right refuses to join in the suit for its recovery. In such case the other mayne in the name of both and summon him to appear. And if he dont appear the court will sever them and enter it on the record back of the record — when the party prosecuting may proceed as tho he was alone.

But when one of several Defts. died the General rule at Com. law was that the writ did not abate. 1 Roc. R. 3 Mod 249. 1 Show 186. Hawk. 147

In such case however the Pltff. must have suggested the Defts death upon the record, for if judgment were given against all it would be erroneous in toto and a writ of error coram nobis would lie.

In Eng. a stat and in Eng. the stat. 17 Car. 2d and 9 Wm. 3d tend to remedy in a great measure the inconveniencies of the Com. law (i.e. a statement by the Court of parties). By the latter stat. if either one of the several defts. of or Pltfs. die the rule is if the cause of action is such as would survive to the advantage of the surviving Pltf. or against the surviving Deft. the suit does not abate. But the surviving Pltfs. ~~may proceed~~ must suggest the death of the deceased Deft. and then the suit may proceed. The above stat. also provides that if there be but one Pltff. and he dies after any interlocutory judgment if the cause of action is such as would survive to his Exr or Admr the suit does not abate but may proceed &

Remarks

(c) If there are two Pltfs. and both die pendente lite at different periods the action I suppose survives first to the survivor & then to the Exect.* — Qu. —

4 Bac. 42. 06. 4.

If two Defendants die ut supra the action survives first against the survivor then against his Ex.* —

4 Bac. 4 Ab. 06.

* Co. Litt. notes say "in most case"

Stat. Gov 2 Ch. 3 1 Com. 44.5.

[9] Secus in N.Y. I presume — Words of the stat. are "in all actions depending" &c. 1 Vol. St. 537 —

Co. Eq. 892 1 Just. 139 1 Bac. 7. 9. Co. L. 892. Co. L. 139.

Pleas and Pleadings.

and in this case the Pltfs. Exors. or Admrs. may intervene and prosecute the action.

If there be but one Deft. and he die after any interlocutory judgment in Eng. or Con. and the cause of action be such as would survive against the his Exors. or Admrs. the suit does not abate — But the Pltff. (having suggested the death of Pltff. on the record) his Exors. or Admrs. may take out a sire facias against the Exors. of the Deft. requiring him to shew cause why judgment should not be rendered against him.

If all the Pltfs. die pendente lite at different times pendente lite the Exors. of the one who died last is the proper person I conceive to prosecute the suit, i.e. if the cause of act is such as would survive to the personal representatives. And in such case his Exors. who died last would be preferable to the Exors. of the original Pltff. who died first. So if all the Deftfs. die as above and the cause of action would survive against the personal representatives the sire facias must issue against him who died last. (o)

In such case the Exors. of the last surviving Pltff. is accountable to the Exors. of the other Pltfs. for their share of ~~the~~ what he recovers; and the Exors. of the last surviving Deft. can come against the Exors. of the other Deftfs. for their proportionate share of his burden which has been recovered against him.

Real actions will always abate by the death of either party when there is but one of a side, for real actions never survive to the Exors. or Admrs. And our stat. says nothing of the Heir. But if there be two or more the action will not abate by the death of one, if the cause of action be such as would survive in favor of the surviving Pltff. in the one case and against the

Remarks.

* If the variance is in point of form only plea in abate=
=ment is necessary if in substance, plea tho' proper
is said to be unnecessary and judgment may be
arrested or the suit dismissed by the court
Ex Officio Exp. Pltf. in his writ demands $20
and shews in his declaration that $10 only are
due — but this not agreable to modern practice
in Eng —

1 H.B. 249.
1 Com. 87.
Yelv. 5.

Hob. 279. 4 Bac.
43. 4. Bac. 6. 722.
121. 185. 198.
Bosk. 19. 26
Hob. 38. 192.

2 Wils. 394.
4 Mod. 246.
Salk. 65 & 701.

1 Com. 44.

surviving Deft. in the other.

In Ken it has been decided by the S. C. in the case of Griswold and Moore that petitions for a new trial are within our stat. upon this subject. A.D. 1800 in Hartford county and this judgment was affirmed in the C. of Errors June 1803.

IV. Variance of the writ from the declaration is an other good cause of abatement. 4 Bac. 20. 4. 3. 30. 34.

It is said that the declaration itself abates the writ and if the declaration varies from the writ in point of form only it must be plead in abatement.

But if the declaration varies from the writ in point of form substance judgement shall be arrested after verdict for the mistake is fatal; the writ giving no authority to the court to render judgment upon such a declaration. X

But this is contradicted by later authorities where it is said in general terms without any distinction between formal and substantial variance, that the mistake must be plead in abatement.

A variance in point of form consist of such mistakes as that of giving the Deft. a different name addition &c in the declaration from that in the writ. X

A variance in point substance consists in giving the Pltff. a different title, quantity interest &c in the declaration from that in the writ.

If there is a variance between the ~~writ and declaration~~ instrument sued upon and the discription of it in the writ it is a good cause of abatement. Collin's notes say Demurrer.

This cause cannot exist in Con. for the instrument is never described in the writ.

Remarks.

1 T.R. 656.
Plow. 84.
4 T.R. 612.
1 Bos. & Pull.
7. Doug. 640.

1 Cow. 44.

(4) the last cofe of demurring is low in Counts — and see not why a demurrer is not proper according to the Eng. practice. 2 Wils 339 Stra. 1146. 2 Seba. 42. Doug. 208. 213 — Bu. N. P. 313. Hob. 18.

Riley 106.

1 T.R. 656
Plowd 84.
Doug. 640
Bos & 698
4 T.R. 612.

Riley 106.
7. & Pils.
339. Doug.
208. 2 Stra.
1146. B.N.P.
313. —

4 T.R. 612.
1 T.R. 566.
656
6 T.R. 766
2 B. 84.
& 87. 299.

1 Cowen 10. 11.
Co. Lit. 164.a
189.a 195.b
198.a Salk.
4. 7 T.R. 243.

Pleas and Pleadings.

So if there is a variance between the instrument sued upon and the description of it in the declaration the usual mode of taking advantage of it in Eng. is under the general issue in evidence. Thus if the declaration counts on a bond as executed in 1800 and the instrument produced is dated in 1801. this cannot be given in evidence but this variance works a nonsuit.

But in Con. advantage is usually taken of this variance by a plea in abatement — As it is countenanced in Eng. tho' not usually.

Whenever there is such a variance advantage may be taken of it in one of these four ways — 1st. By plea of abatement 2d. by objecting to its evidence under the general issue as not supporting the declaration which the jury must find, 3d. by objecting to its admission in evidence which is the usual mode in Eng. or 4th. By praying oyer of the instrument and putting it on the record and demurring to it as evidence. (4)

But the declaration cannot be demurred to after putting this variance upon the record after oyer. since all objections which can be made to this must be made to the declaration itself particularly and what originally appears on it. But the declaration is good before any oyer and this cannot vitiate that.

So a misnomer of the Deft. if it works a variance between the instrument and declaration may be take advantage of under the general issue. But always as a variance never as a misnomer.

VI. So the nonjoinder and misjoinder of necessary parties is a good cause of abatement —

Remarks

(a)

were tho' it appear upon the face of the declaration that some other ought to join 6 T.R. 466. 7 T.R. 280 Skinner 640; 5 East 420 1 Bos & P. 70 to 75. may give it in evidence in mitigation of damages

If one of several wrongdoers is sued alone no advantage can be taken of it — Co. Ly. 142. Hob. 66. 2. 1 Com. 18. 1 Roll. 294.

6 T.R. 282. B.N.P. 132. 1 Bos & Pull. 73.

Stra. 820. 1146. 5 T.R. 18. Co. Ly. 142. Esp. 142. Salk. 429. or 290.

5 Co. 18. Esp. 204. Stra. 1146. or 1140.

ut supra

6 T.R. 766.

Cowy. T.R. 270. or 279

Writs and Pleadings.

It is a general rule that if one sues alone when another ought to be joined with him this omission is always pleadable in abatement.

This rule is applicable to all actions whatever real, personal, ~~and~~ or mixed.

So if two persons should join to enforce a right vested in one the misjoinder is pleadable in abatement. 1 Leon. 315. Hob. 72. 1 Roll 294.

If in an action founded in contract one sues alone where an other ought to join; ~~of~~ or if two join where one ought to bring the suit alone the general issue may be plead and this taken advantage of as well as abatement for the contract to be proved is not the same as that declared upon — (Vide Page 25 ante)

But if the action is founded in tort and the same defects appear ~~as~~ ut supra they must be taken advantage of in abatement if at all.[a] For the trespass laid is the ~~trespass~~ trespass proved notwithstanding these defects —

But if two join or Plfs. in an action founded in tort where one ought to sue alone it is thought that abatement must be taken, tho' no authorities to this point — (see Page 26 ante)

If in an action founded on contract one sues alone when an other ought to be joined and this appears in the declaration the mistake is patat and cannot be cured even by verdict — But it is not so in tort —

If one part owner of a chattel sue alone for a tort and so

Remarks.

(x) If two are sued on a contract where only one is liable advantage may be taken of that under the Gen. Issue — 1 East 48 —

3 Burr. 2611.
2 Bl. R. 947.
5 T.R. 447.
651. 1 H. Bl.
236 Co. 206. 5 Co. 119.
contra Salk. 440

9 Rep. 110.
Cro. J. 152.
1 Bosh. 72.
2 Bac. 698
Co. L. 383
5 Rep. 119.
1 Vent. 34.
(Salk 440 contra)

Pleas and Pleadings.

plea in abatement is entered so that the judgment goes against the Deft; the other joint owner may afterwards sue alone for his part of the dam-ages sustained. 7 T.R. 279.

So far of the nonjoinder and misjoinder of ~~partner~~ Pltfs.

Of the nonjoinder and misjoinder of Defts. Rule – If one of two Copartners or Joint Obligors is sued alone ~~for his part of the dam-ages sustained~~ on the contract the misjoinder of the other must be pleaded in abatement if at all, or it is wrong, unless it appears on the face of the declara-tion that an other partner or obligor is living ~~is~~ liable to be sued – which is fatal to the decla-ration and even verdict cannot cure it. 3 Bac. 698. 5 Bur. 2614. 1 Vent 8.

Abatement must generally be plead because the General issue will not ~~do~~ do, for it is the deed of each tho' not his sole deed. On this subject there are contrary opinions – the reason of this rule as applicable to parol contracts is obvious – There are fre-quently dormant partners in a house but if the only active partner is sued on the contract in his plea of abatement he must discover all the partners – But if he could plead the general issue he would be obliged to discover no more than one part-ner to avoid the nit which would be subjecting the Pltff. to great incon-venience. (Vide Page 25 rule) (X)

But if two or more join in committing a tort, one or any other mem-ber may be sued – the above rule therefore is only predicable of contracts.

VI. The pendency of a prior suit between the same parties for the same

Remarks

1 Co. 3 Bac. 12.
4 Do. 48.

Moor 118. 539
5 Rep. 67.
Hob. 134.
4 Rep. 45.

5 Co. 61. a b
4 Co. 42. a
Hob. 144.
1 Com. 44
Moor 12.
539-
5 Co. 62. a
2 Wils. 87.
1 Com. 44. 50
4 Bac 44.
1 Bac. 23.

1 Bac. 22. 3
Cairs 0. 144
Colman 94. Contra 1 Johns C. 394
1 Bac. 12. 15
4 Do. 48.

Pleas and Pleadings.

thing is an other good cause of abatement. The law is said to abhor a multiplicity of suits and this rule is in affirmance of this maxim.

But the rule does not hold unless both the suits are of the same nature, or concurrent in their causes — as Trover and Trespass frequently — 1 Cons. 49.50.

But where several rights of action grow out of the same cause of action one shall not abate the other — As prove a mortgage three distinct rights of action grow.

So also if the prior suit is in an other and different court yet this is a good plea in Eq. except it is in an inferior court. But in Law. this rule can hardly apply as our courts have no concurrent jurisdiction in Civil cases — 2d. — Hence would it be ill to plead in our superior court the pendency of the same suit before the county courts, since their jurisdiction over it must be exclusive.

But in criminal cases it may apply in two instances. As the Superior & County courts have concurrent jurisdiction in the cases of Riots and House stealing.

In Eq. B. where the right of action has accrued and the suit is pending in an inferior court that cannot be plead in abatement of the suit

It is not necessary to give effect to this rule that the first suit should be actually pending at the commencement of the same time of the second for then the latter suit is a nullity ab initio —

For if a nonsuit is suffered before the time of pleading arrives to the second, yet the second will be abated since it is

Remarks.

1 Root 365.
562.

1 R. 365

1 Root. 155.

Hob 137.
Earth. 96.
97. 4 Bac.
49.

Pleas and Pleadings.

deemed ab initio vexatious.

In Lou. it has been decided by our superior Court that if the second action is necessarily brought for a proper purpose it shall not abate. As if A. in the first suit attaches the goods of C. instead of B. his failing debtor he may institute a second suit against B. and it will not be vexatious –

So if the first action is misconceived or not adapted to his case – a second suit is good for the Pltff. – as when he brings trespass when trover alone lies – Because the first suit will not answer the same purpose tho' for the same thing – And this agrees with the spirit of the Eng. Law.

This rule was also recognized by the County Court in Litchfield County in the case of Trall and Barber two years ago. and Kellogg vs Miller at the last term Decr 1804.

So it has been decided by our superior court that the pendency of one action of book debt does not prevent the Deft. from suing the Pltff. before the first is disposed of – But our stat. precludes him from costs if he neglects to present his book for a balance to be made in the first suit unless he has very good reasons. This however the action is brought in the second place by a different person.

So also this plea is good in the second suit altho' a new Deft. is added in it. Thus if P.S. brings an action against A. and before this is disposed of brings a second against A & B. the

Remarks.

(o) so also if one of the ~~Defts~~ in the first action is omitted in the second suit —

Hob. 127
Lutw. 42.
1 Show. 71.
1 Bac 13. 14.
24.

Where the second suit is manifestly not vexatious the first cannot be plead in abatement — this is the great rule on this subject —

1 Bac. 14. 24
Allen 34.
Wms. 24
4 Bac. 49

If the first suit is wholly inefectual it shall not be plead in abatement for in this case the second is not vexatious and indeed it may be necessary to commence ~~to commence~~ the second immediately as a speedy remedy may be required —

Sta. 420.
1 Com 50.
Hob. 127. 8
2 Haw. 190.
235. 367.
1 Bac. 13
4 Bac. 49

(q) Secus of informations —

Hob. 128.
1 Com. 49.
Moor. 444.
1 Bac. 13.
4 Bac. 48
Moor 13 Q 24. 9

Post
1 Roll. 315.
316.
3 Wils. 341.
Salk. 700

first may be plead in abatement of the other. Tho' it is doubted whether it abates as to both Defts. The better opinion is that it abates as to both — (c)

If the second suit commences the same day that the other abates or is otherwise terminated, it is presumed that the last was sued out after the other had abated, and this presumption cannot be abated or rebutted. so here in this case the second suit will not abate —

But it is no cause of abatement that an other action for the same thing is pending against a stranger. As in Trespass against A. it is no plea, that B. is sued for it. tho' damages cannot be so twice recovered.

So it is no cause for abating an Indictment that an other is pending against the Deft. for the same offence, as the court in its discretion will quash one of them (g) for the court has a sort of discretionary power over indictments. So in appeals the rule is the same. ×

If two informations are exhibited by different persons on the same day for the same offence, each will abate the other for with few exceptions it is a general rule, that no fractions of a day are admitted in law and they both are presumed to be exhibited ~~on the same day~~ at the same instant.

VII. That the writ unduly issued or was not duly authenticated is an other good cause of abatement.

So in general is any irregularity or informality in the writ. As if it is made returnable to any other than the next succeeding court provided a sufficient time has intervened between the date and the session for legal service. Yet this need not be plead, as in strictness

Remarks

4 Bac. 43.
1 Com. 46
2 Johnson
Jones. 83

1 Sid. 304.
1 Com. 46.
Co. Ely. 592.
1 Show. 70.

1 Sid. 406.
Co. Ely. 50.
Salk. 69.
Co. J. 50.
Lutw. 25.
2 Hil. 467.

Stra. 818. 813
1 Bla. R.
893. 890.

Stat. 35.

it is void and any person acting under it the court will dismiss it ex officio.

So if the writ is not signed by proper authority, this is a good comp. of abatement. Yet this need not be pleaded as it is not in its structure void, and any person acting under it is a trespasser.

So in Lou. if there is no certificate of the payment of the duty the writ is abatable, tho' not necessary to be pleaded, since this not only is voidable but strictly void.

So if there is no date to the writ or an impossible one (as the 30th of February) the writ will abate and in Eng. the date cannot be amended. 1 Lev. 2. Cro. E. 592. 1 Sid. 304. — 1 Lou. 46. 1 Show. 80.

In Lou. our S. C. has given no decision on the subject of amending the date. But the C. Court allowed it to be amended in the case of Wadhams in Litchfield County.

So if the writ has a defective return it will abate by this is meant a shorter time intervening between the time of service and the Term, than the law requires.

So also at Lou. law if the service is insufficient on the face of it, it will abate the writ but at Lou. law if the service is not apparently insufficient on the face of the return or in other words if it is good on the face of it it cannot abate the writ, tho' it be so in fact; for the return cannot be contradicted for the purpose of defeating the suit. Still however the officer is liable to the party for a false return.

But in Lou. it may be plead in abatement whether it is apparent on the face of the return or not; since the return may be con-

Remarks.

7 T. R. 243.
4 or 1 Com. 45.
5 Bac. 322

Str. 44
Salk. 66
1 Bos. & Pul.
20. Id. 245.
Comyns 10 or 510
1 Bac. 35.

1 Com. 47.
117. 118.
7 Co. R. 2.
3.

1 Bac. 34.
1 Com. 47. 17
118. 123.
7 Rep. 23

tradicted here to defeat the suit.

So if the sheriff omits to leave a copy of the writ with the Deft. in common attachments, this will abate the suit.

But if he omits to leave a copy of the writ with the ~~Deft~~ town clerk as the law requires when he attaches land this cannot be plead in abatement, for it does not effect the controversy between the Pft. and Deft. But if any damages accrue to any one from this neglect the officer is liable to an action for them.

VIII. If the Venue in the writ is omitted in Eng. it is an other good cause of abatement. If it is omitted in the Declaration it is a good cause of ~~abatement~~ demurrer.

This word Venue in Norman French signifies "neighborhood." And it is used in law to denote the county where the action is laid.

The Pft. in Eng. may set his action to what county he pleases if it is transitory. Hence no plea of abatement will answer if such are set wrong. But the court in their direction may on motion alter it, tho' they exercise the power very seldom.

But in ~~local~~ local actions if the Venue is wrongly laid this is good cause of abatement. For in actions concerning land the Venue must be laid in the county where the land lies. Hence it is a good plea of abatement in Real or Mixed actions, that the land lies in an other county from that in which it is laid.

In Con. we lay no Venue at all in our transitory actions except

Remarks.

(a) by "praying judgment of the Writ or Declaration (as the case may be) ——

(b) It is said that where the matter of abatement is *dehors* the plea concludes with praying Judgment Holt, Con. 25. only, but the distinction I believe is not attended to — 4 Bac. 50. 1 Bac. 15. Moor 36 —

The character of a plea it is said is decided by its *conclusion* without regard to the *matter of it* or its *beginning* Sueur 112. 4 Bac. 50. Sd. Ray 649 12 Mod. 133. 525. 6 Mod. 103 1 Sid. 189. 1 Show. 4. 6. Sutw. 34. 86. — But according to Sd. Holt the *beginning* and *conclusion* form the criterion and he takes this distinction. Viz Tho' the matter would be good in bar, still if the plea begins and concludes in abatement, it is a plea in abatement But in such case if it begins in in bar and concludes in abatement it will be a plea in bar or if it begins in abatement and concludes in

3 Bla. 303. 5 Mod. 524. 1 Sd. Ry. 694. 1 Show. 4. 6 Mod. 103. 4 Bac. 50 1 Bac. 15 Sueur 112. 12 Mod. 524

4 Bac. 49. 1 Sd. Ry. 593. Ib. 694. — 6 Mod. 103.

Pleas and Pleadings.

in actions founded in tort and here it is not necessary since the residence of one of the parties denies the county.

But in local actions, as the land must lie in the county where the suit is brot, the common law rules apply to us in this respect, tho' it is thought that the plea should go to the jurisdiction and not in abate=ment. Several other good causes exist, but these are the principle ones.

As to the mode of pleading and manner of concluding in Abatement &c

Regularly pleas in abatement conclude to the writ, tho' sometimes they conclude to the declaration i.e. where the plea goes to the declaration (a) (b)

As to the distinction between a plea in abatement and a plea in bar. It is said in Lucas & Wm. G. 1 this opinion that the charact=er of every plea is decided by its conclusion. But according to Lord Holt the begining and conclusion taken together decide the nature of the plea; And he takes this distinction that altho the matter pleaded goes to the action, yet if the plea begins and closes to the writ it is a plea in abatement. Or if the matter pleaded be only in abate=ment yet if the plea begins and concludes in bar it shall be so considered. And so if it begins as a plea in abatement and concludes as a plea in bar it shall be esteemed a plea in bar & vice versa.

But if a plea in abatement ~~is~~ informed on matter which goes in bar only

Remarks.

Issue Would it not be as well to plead the Gen. Issue and then object to the witness offered by the opposite party — 2 Ld. Ry. 11. 53. 57/92. 107. 116.

1 Bac. 14. Co. Lit. 128 a. Co. Lit. 128 a. 1 Mod. 244. 12 Vt. 400.

conclude in bar it will also be a plea in bar 4 Bac. 49. 1 Ld. Ry. 593. 2 Ld. Ry. 1018. 6 Mod. 103 —

But it is said if matter which is good either in bar or in abatement, begins in bar and concludes in abatement or *vice versa* the Plff. may answer either as a plea in bar or in abatement — 4 Bac. 50. 1 Vent. 136. 3 Mod. 281. —

1 Com. 105. 37. Hob. 199. Carth. 114. Co. Ely. 325. 2 Bac.

Ld Qu. whether the conclusion does not decide (as above) —

ut supra & 2 Lev. 197 Sutch. 3. 74. 16 —

As to the form of pleading in bar or abate=ment beginning & conclusion Vide Ld Ry. 10. 53. 57. 92. 107. 116.

4 Bac. 57. 1 Str. Carth. 8. 9. 1 Com 66 —

Plea in abatement of matter which goes in bar only is not good — So if plea in bar of matter which goes in abatement only — 4 Bac. 46. 1 Bac. 14. 85. 1 Mod. 244. Co. Lit. 128. 9. Otherwise in both cases if the matter is such as may be pleaded either way or outlawry & alienage may in certain cases — 12 Mod. 400. 4 Bac. 50. 1 Mod. 244.

1 Dark. 3 4th 1 Bac. 15.

Pleas and Pleadings.

the plea shall be considered a plea in bar. So if a plea in bar is founded on matter which goes in bar or abatement only it shall be treated as a plea in abatement. As if the Deft. in a suit should plead a release in abatement it would be treated as a plea in bar.

If the matter goes ~~only~~ either in bar or abatement and the plea begins with one and concludes with the other the Pltff. may elect which he will consider it. 1 Vent. 136. 3 Mod. 281. he may consider it as a plea in bar or abate.

But there are certain cases where particular facts may be pled both in bar to the action & as dilatory pleas. Outlawry and Alienage under certain circumstances.

So that the cause of action did not accrue until after the ~~commencement of the suit~~ ~~date of the writ~~ may be pled in bar to the ~~suit~~ action or to the writ. and if it appear on the record judgment for the Pltff. would be erroneous in abatement. Co. Litt. 114, 1 Show 147. Croke 2. 325. Co. J. 69. 80. Yelv. 70.

The Deft. may not however plead two causes of abatement at the same time of the same kind. As if the Pltff. has suffered two outlawries he cannot plead but one of them in one suit. or outlawry & excommunication —

But several causes of abatement of different kinds may be put into one plea — As misnomer want of service &c &c — Co. 2. 304.

Where a cause of abatement is pleaded and judgment is rendered, a writ of error may be taken from such a judgment as well as from a judgment in chief but not until after judgment in chief has been rendered, as that may be in the party's favor and then no damage has accrued.

Remarks.

(o) Exception to the last rule in certain actions or where the Defect is such as goes to the action — one which may be taken advantage of in any stage of the pleading or the one which have notice of Courtesie —

6 T.R. 766.
3 Bla. 151.
Ld. Ky. 594.
Stile 254.
2 Rol. R. 58.

Salk. 2. 6a
Ely. 286. 592.
Co. Lit. 303.

6 Co. 7. 46.
8 Co. 37 b. 38 b.
4 Co. 48 a.
2 Vent. 190.
4 Bac. 29.
115.

Yelv 112.
1 Vent. 22.
2 Show. 42.
2 Bla. 305.
396 —

3 Bla. 303.
396. 397.
2 Wil. 262 &c
1 Part 542
4 Bac. 51.

An abatable defect is no cause of error, if not pled in abatement, for if not pled it is waived (a). This rule however extends to mere matters of abatement only. Yet there are some causes of abatement which may be pled in any stage of the proceedings, or coverture — if not pled by the wife in abatement may be ~~taken advantage of~~ pled by the husband at any time in bar and error will lie if judgment be rendered against her in chief.

But on a scire facias founded on a judgment the Deft. cannot plead in abatement, anything which he might have pleaded in the original suit — A scire facias is a suit to enforce a judgment.

As the plea in abatement does not regularly go to the merits of a cause a judgment upon it cannot usually go in bar of an other action for the same cause. except where judgment goes in chief in some few instances it does —

But judgment in chief is in bar of an other action for the same cause, for the merits of one cause are not twice to be decided. Nor can the merits of one judgment be called in question by an other original suit.

But where the judgment in abatement is in chief this may be pled in bar to an other action for the same reasons.

Of the judgment in ~~this~~ plea of abatement is that the declaration or writ as the case may be, be quashed when it is rendered in favor of the Deft.

If judgment is rendered for the Pltf. on a demurrer to the plea in abatement, it is called a respondeas Ouster or let him the Deft. plead to the action

Judgment in chief is a decision on the merits of the action.

But if an issue in fact be joined on this plea in abatement the judgment

Remarks.

(o) Tid 565. (See Johns. R. 397. Marston vs Lawrence & Dayton where there was an issue on replication of mulctiet recow to plea in abatement & judgment of respondt. ouster —

1 Bac. 15
594. Id. Ry. 594.
6 Mod. 236.
1 T. Ry. 119.
1 Lev. 244

5 Bac. 51.
2 Hawk. 334.
1 Bac. 15.

Swift. 204.

Id. 4. 30

* Id. Ry. 1020.
1 East. 604.

Salk. 220.
1 Show. 91.
4 Mod. 97.

1 Bac. 15

Pleas and Pleadings.

if in favor of the Pltff. at common law is in chief — and there is no room to plead over or quod recuperet the
And so in all trials for minor offences the case is the same. (c)

Because the deft. in a cause is never entitled to more than one trial by jury. And besides it is said to be a punishment to him for putting in a false plea —

But in trials for capital offences this rule does not hold as the criminal may have the privilege of answering over to the action if his plea in abatement fails —

In Conn. it has been decided by the superior court that if the issue is closed to the court the judgment shall be "respondeas ouster" But if to the jury it shall be in chief.

This seems to imply that such issues may go to the jury in Conn. But we would doubt it since we have a statute requiring all pleas in abatement which are in the county courts to be tried before a jury is impanelled which implies that our legislature intend that these should always be tried by the court — The universal practice thus to the court in this state —

* If matter which goes in abatement is plead in bar, judgment for the Pltff.
is given in chief for this the Deft. plead pleads to the action —
It is a rule of pleading that
The Deft. cannot demur in abatement for matter of abatement is no cause of demurrer — since a demurrer only goes to the pleadings and has no possible connection with the writ. — he cannot demur to any fact in the writ *

If he does demur judgment goes in chief against him — But

Remarks-

(6) The Pltff. however may demur to the plea in abatement 6 T.R. 369 —

Salk. 220.
1 Show. 91.
7 Mod. 94.
2 Ld. Raym. 934.

(8) unless the matter goes in bar & then it must be plead in bar —

4 Bam. 51.
Hob. 126.
2 Saun. 40. 1.
1 Bac. 9.
3 Bla. 316

Kirby 5. 6.

4 Bam. 51.
Hilton 126
2 Saund 140. 1.

3 Bla. 316.
1 Bac. 9.
4 Bam. 29.
148.
6 T.R. 369.

1 Root. 564
Stat. law.
342 —

Pleas and Pleadings.

if a person prosecuted for a capital offence should demur to matter of abatement judgment would not go in chief, and he would ~~not~~ be allowed to reply over — Since the rule does not hold except in ~~actions~~ pleas to the action, which this is not as the prisoner in such cases is privileged to answer over — (6)

After a judgment of Court "Forthwith dear Barter" no plea of abatement for Deft. ~~might~~ plead ad infinitum will be allowed, but the Deft. must plead to the action.

But in cases where the Pltf. amends his writ after a plea of abatement is adjudged sufficient, the Deft. may plead in abatement a second time for now it is considered as a new writ with the restriction of the other rule —

After a general imparlance the Deft cannot plead in abatement, unless the cause of abatement accrued accrues afterwards — after the imparlance.

But after a special imparlance he may, as this saves to the Deft all dilatory ~~pleas~~ exceptions —

So tho' there is no imparlance yet after the rule for pleading in abatement is out the Deft. can't plead in abatement. (9) This time in Eng. is four days after the commencement of the term. In the S. C. of Can. any time before the opening of the court in the afternoon on the second day of the term —

A very few original pleas in abatement are tried in the S. C. as the body of causes are removed there by appeals.

The stat. has ordered that all such pleas in the County Courts

Remarks.

Kirby 49.

Co. Lit. 126.a
5 Com. 142.
4 Bac. 54

1 Wil. L. 213.
2 Bla. Rep.
1312.
8 T.R. 248.

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shall be plead, heard & determined before the jury are impannelled. This is impossible in many cases. So not directly adhered to.

And if an action is continued on the first day of the first term the Deft. may plead on the second term as tho' it were the first. Which in many cases is necessary as in Foreign Attachments.

Matter in abatement cannot be pleaded after the rule for pleadings out unless it goes also in bar and then it must be pleaded in bar.

So if matter is both in bar and abatement it must be plead to the action as coverture &c.

The former practice was to try pleas in abatement without a replication and then they were considered as demurred to. But the practice is now different and they are answered as any other pleas.

Of Pleas to the Action.

There are of two kinds 1st General 2d Special.

I. Of the General Issue.

Issue is defined to be a single certain, material point arising out of the allegations of the parties and consisting regularly of an affirmative & negative.

Mr Gould concives that there is no necessity for the word "material" in the definition as there really is in pleadings "immaterial" issues.

It is a general rule according to the strictness of the law.

Remarks.

(*) and indeed any qualification of it tends to looseness and uncertainty & the rule becomes vague — 4 Bac. 5.P.70 Co. 2.126. 1 Wils. 6 Sta. 1177. 1 Vent. 213. 2 Bla R. 1319.

Sir W. Jones 6 1 Wils. 6 Sta. 1187.

2 Sta. 1177. 3 Bla. 305.

2 Sta. 1117. 3 Bla. 305

3 Bla. 305.

Com. Dig. 126 ~~Clough~~ 4 Com. 142

Pleas and Pleadings.

law that in order to form a good issue there must be a direct affirmative & negative — 24. One plead that J. S. was dead the other that he was alive no issue 8 T.R. 278.

But it is also said if two affirmatives one directly contradictory and one makes the other absolutely false, it may be a good issue —

So it was one holden that where one party plead that he was born in France and the other replied that he was born in Eng. it was a good issue — this is not however according to the strictness of the Com. Law.

At Com. Law likewise there are one or two exceptions to the general rule requiring an affirmative and negative — For in the writ of ~~ne~~ right the General issue was in these affirmatives. the ~~Pltff. declares that he has more right than the Deft.~~ Demandant declares that he has more right than the Demandant ~~Deft.~~ tenant and the ~~Deft. says~~ tenant that he has more right than the Demandant.

But the most proper mode of joining an issue in all cases is by a direct Affirmative and negative — according to the old rule — (1)

There are two species of issues in Fact — 1st General & 2nd Special issue in fact —

A General issue in fact, is always plead by the Deft. and is a denial of all the allegations in the Pltffs declaration —

A special issue in fact, is one that is taken on some particular point of the declaration or on some special matter alledged in the course of the proceedings. And every issue in fact except a general issue is a special one.

Remarks.

(c) The gen. issue refers to the count not to the writ — Plea to the action. Ex. In account the writ charges the Deft as receiver generally Count as receiver by the law of A. Issue to the count — Co. Lit. 126. 4 Bac. 54.

3 Bla. 305. Co. Ply. 237. 3 Mod. 324. Ld. Ray. 1500. C. Lit. 126. 4 Bac. 54. 84. Cro. 8. 257. 0. 324.

(8) The General Issue refers to the count not to the writ — Plea to the action Ex. In account the writ charges the Defendant as receiver generally — Count as receiver by the law of A. Issue to the Count — Co. L. 126. 4 Bac. 54.

×Ply. 462 Skin. 280. Roy 56.

× but not in all cases were at Com Law for there are other modes of trying such issues in certain cases at Com. Law. Ex. by record — inspection — certificate — battle &c — 3 Bla. 330.

4 Bac 58. 84. Ex. Dy. 167. Sta 1022. 1 Dev. 142.

Co. Lit. 126 ≐
3 Bla. 318 a
3 B. 315.
4 Bac. 54.

Pleas and Pleadings.

To any action brought on a misfeasance the proper general issue is "not guilty" and so to actions for any nonfeasance arising "ex delicto".

The proper general issue to debt on simple contract is "nil debet". To debt on bond or other specialty "non est factum". To debt on ~~record~~ judgment "nul tiel record". To account "never bailiff and or receiver". To assumpsit "non assumpsit". To replevin "non cepit" tho' it is supposed "not guilty" would be good. To debt on a penal stat. it is supposed that "nil debet" or "not guilty" would either of them be a good plea; for he who denies the offence denies also the indebtedness which is founded on it. And to Ejectment the proper plea is "not guilty". "not guilty" was formerly held to be a good General Issue to the action of Assumpsit it being an action of trespass on the case; but such a plea would now be had on demurrer which is special tho' it is cured by verdict 1 Lev. 142. In debt for rent "riens in arrear" is a good general issue where on a covenant — Cowp 588. 1 Brownl. 19. (c)

In Lon. the General issue to Ejectment is "no wrong or disseisin" Then we also plead to an action brought for the recovery of a term for years which is ill "not guilty" is the proper plea.

So to an action brought for the recovery of a freehold we plead "no wrong or disseisin".

The general issue (8) always contains the words "modo et forma" manner and form — as thus "the Deft. is not guilty in manner and form as alledged in the Pltfs declaration"

Issues in fact always generally conclude to the country by which is meant the jury. tho not always as nul tiel record when this is pleaded the trial goes to the Court

Remarks

(8) In either case the Issue is joined by the opposite party's adding "and the Plff (or Deft. as the case may be) does the likewise — This is called the ~~reli~~ similiter — the similiter order of course now by the party who takes issue —

Stat. Lou. 26. 27.

An issue always closes the pleadings and when well tendered must always be accepted. If not well tendered it may be demurred to — Carth. 88. Lomb 86 — 4 Bac. 55. 3 Bla. 314. Co. L. 126. 1 Saun. 338 —

(9) Ex. Gen. Issue pleaded to a battery laid to have been committed swords clubs &c.

1 T.R. 462. Mor. 86. Ind. Ex. 257.

Sch. text. 4 B.B. Co. Sch. 481 on 2 B.P. 4 Bac. 56

Mas and Pleadings.

Regularly matters of fact go to the jury and matters of law go to the court. But in court the parties may by agreement put matters of fact to the court and frequently do. But the Deft. in such case must always expressly state that it is by agreement that he puts it to the court or it will be ill on special demurrer.

Whenever either side traverses or denies the facts stated or plea=ded by his antagonists he usually tenders an issue — the form of tendering an issue or following the traverse or denial comes from the Deft. the issue is tendered in this manner "and of this the Deft. concludes thus and of this he puts himself upon the country for trial" But if the traverse comes from Plff. he tenders the issue in an other form "and this he prays may be enquired of by the country" (c)

When a penalty is inflicted by ~~stat~~ a penal statute for which an action of debt is brought by an individual "nil debet" is a good plea yet it seems that "not guilty" is also a good plea; ~~yet it seems that "not guilty" is also a good plea~~ Co. 8. 57. this point is not settled.

The general issue refers to the count or declaration and not to the writ. 4 Bl. 84. Co. Lit. 126.

A proper issue always closes the pleadings and when it is well ten=dered must be well accepted by the opposite party.

The words "manner and form" which are generally used in tendering an issue are sometimes ~~words~~ of the state=ment of the issue and sometimes words of form only. (9) the rule of distinction is, when the issue goes to the gist of the action the words are of form only, in which case they do not deny the manner in which the facts are

Remarks.

(6) Ex. Deft. pleads fefment by deeds the Pltf. "modo et formaq" here a fefment without deed tho' good at Com. Law cannot be found —

(7) Issue cannot be joined on a negative preg= = nant or affirmative pregnant. Ex. Plea of "release since the date of the writ" Replication "not his deed since the date" &c. but such pleas are aided by verdict ~~at~~ and it seems are ill on special demurrer only — 4 Bac 98. Co. L. 126. 303. 5 Bac. 20. Cro. Ja. 37. 312 —

1 Bac. 103. Latch. 271. Cro. Eliz. 227. 10 Mod. 19.

5.
1 Rol. Ab. 97. Salk. 7
2 Bla. Rep. 1052. Gilb. Ev. 162. — — —
2 P. Wms 145
6 Mod. 231.
12 Mod. 609.
12 Vin. 188.

1 Ch. 228
2 D. Rep. 88.
89. —

5 Co. 119.
Plow. 66 a
o. Gilb. Ev. 162.
3 Bin. 1805.
Hob. 2. 2.
166 — — —
Bla. 6.
292.

stated to have taken place, but merely the facts themselves. But when the issue is taken upon a collateral point arising out of the new matter which the Deft. has alledged, they are words of substance (2) and deny the manner in which the fact is averred to have taken place as well as the fact itself.

An Immaterial Issue is one joined upon a point which does not decide the merits of the case and is therefore a defect not cured by verdict. 4 Bac. 56. 2 Mod. 137.

An Informal Issue is a defect in point of form and therefore is cured by verdict. Lutth. 841. Co. 2. 224. &c. 2 Mod. 132. 1 Bac. 103. 1 Lev. 32. Vide 2 Pa. Q. Judgment not reversed for "misjoining of the issue." 1 Vol. 3 St. 129.

(2) Notwithstanding this general rule that the general issue is a denial of all the material facts in the declaration in some cases it may be pleaded when no one of the facts is intended to be denied as where a specialty is void from the absolute incapacity of the obligor.

When an action of debt on bond is brought against a feme covert the general issue may be pleaded and the Deft's coverture ~~may~~ will support it. yet in this case the general issue is "non est factum."

But if a specialty be void in its own nature "non est factum" is not on this account a good plea. The special matter which renders it void ought to be pleaded as usury for example and so also if a contract be void from an incapacity which is not absolute as that of infancy. ~~then~~ infancy ought to be pleaded, for to support the General

Remarks.

(8) so if voidable in case of duress Ld. Ry. 313. 4 Bac. 54. 62. — 3 Burr. 1805. Hob. 72. 166. 3 Co. 3

(8) Ex. Usury so duress must be pleaded — Refuse — loss of seal — Want of complete delivery are taken advantage of under the Gen. Issue of non est factum — — Stat. H. 8. c. 9. Co. 119. Hob. 72. 2 Bla. Rep. 1108. Gilb. L. 162. 11 Co. 27. 5 Co. 119. Espi. 223. 2 S. 224. 19 H. 8. 163.

" Generally matters of fact only are in question under the gen. Issue of non est factum and not matters of law — Exception in the case of feme covert

(9) The rule as in Collier's notes — In indebitatus assumpt any thing which shows that the Pltff. has no right to recover at the time of the pleaded may be given in evidence under the general issue — the promise laid being a legal consequence being a legal consequence of the duty stated whatever extinguishes or that duty discharges the promise — Ex. Usury — Duress — Infancy — release — payment — &c — 4 Bac. 601. 2 Roll. 682. 1353. 2 Burr 1010. Doug 108. — Sta. 49 H. 2 Burr. 1016. Sd. Ry. 787. 2 H. Bla. 148 —

Qr. never that on principle this rule does not hold as to special assumpt. but I find no distinction expressly taken therefore I question it — Ld. Ra. 566) Ch. R. 2. 197. 8. Exp. 147. 4 Bac. 60. 61. 134. 5 Mod 18

Plas and Pleadings

issue of "non est factum" on the ground of an incapacity in the obligor it is requisite that the incapacity be absolute. Co. 2. 91. Stra. 498. Salk. 675. (x)

It is a general rule of the Comn. Law that if a speciality or legal solemnity be made void by stat. the special matter must be specially pleaded "non est factum" or it will not support the general issue. (x)

If an action be brought on a speciality which has undergone an alteration or erasure "non est factum" is a good plea and the alteration or erasure will support the issue; but this rule must be taken with the following qualifications — ~~1st. If of real. and of complete~~ may Lahey.

If such alteration or erasure be made by a stranger in an immaterial part, and without the privity of the obligee the deed is not violated. Therefore the plea of "non est factum" would be ill.

But if the alteration be made in a material part the instrument would be vacated; and if any alteration be made by the obligee or by his procurement in an immaterial part the instrument is vacated. In actions ||.

In actions of Assumpsit any thing that shews that the Pltf. has no right of recovery will maintain the plea of non Asst. (y)

The reason given for this looseness in pleading is that the action is not "stricti juris" and being an equitable action any defence which shews that the Pltf. ought not to recover is proper evidence under the general issue.

There is generally no distinction taken in the books which

Remarks.

But the stat. of limitations. A set off. Bankruptcy. Accord & Satisfaction tender must be plead specially as these are matters of law which go to the discharge and not to the gist of the action.* But a release and payment may be given in evidence under the gen. issue tho' there is no difference between these and the former — Tidd 845. 3 Bac. 5 Ib. Ld. Ry. 153. Espi. 147. Chitty 197. 198. B. R.

Ld. Ry. 566 contra tho' overruled —

* that if they do not deny that there was once a cause of action — So neither does payment or release — This rule it seems applies as well to Indebitatus Assumpsit sed Quere de hoc. Comp. 478. Hob. 174. 5. Espi. 317. Bul. N. P. 171.

Accord & Satisfaction (notwithstanding what is said above) may be given in evidence under the general Issue tho pleading it specially is the most regular — Ld. Ry. 566 — Ld. Ry. 566. Salk. 278. 5 Mod. 18. Espi. 262. 1 Bro. Chan. 92. 2 Swift. 214.

(c) The Deft. may instead of pleading the general Issue deny any single traverrable allegation which goes to the gist of the action (demurring to the rest & concluding to the country — 4 Bac. 607. Co. L. 282. Gilb. 195 — 2 Roll. 682. 5 Mod. 232. Hob. 179 or 174. 175. Comp. 478. B. N. P. 17. Stat. Con. 342.

2 Swift. 2

lay down the general rules between the actions of special asst. and Ind. Asst. but it is holden that the stat. of limitation or accord with satisfaction cannot be given in evidence under the general issue of "non asst." because such a defence contradicts the plea and does not go to the gist of the action but to the discharge of it. For it is settled that a release or even payment may be given in evidence under the Gen. issue of "non Asst."

This becomes of pleading does not obtain in tort. 2 Bull 652. 5 Mod. 252. Hob. 77 a 174. 5. nor in actions brought on specialty. Release must be pleaded or otherwise or any satisfaction 1 Co. 2 Bac 60. 2 Rol. 682. 5 Mod. 252. (c)

It is laid down by Lord Mansfield with respect to actions on the case generally for trespass that as they are not "stricti juris" any thing that shows that the Pltff. has no right of recovery need not be pleaded but may be given in evidence under the general issue. In actions of Assumpsit

Advantage may always be taken of the stat. of frauds and perjuries under the general issue in case of special assumpsit by objecting to parol evidence or arguing upon the insufficiency to the jury.

On Iou. under the general issue anything may be given in evidence to any action which shows that the Pltff has no right of recovery except some ~~not~~ "ex post facto" act of the Pltff. operating as a release ~~of~~ or discharge to the Deft.

By our stat. any act of the Pltff. may be given in evidence under the general issue which goes to show that he never had a right of action.

Remarks.

(X) This rule appears to be differently laid down in Books — Special plea amounting to the general issue is good if it contain special matter of justification — Ex. Deft. Assult & Battery denies the force & justifies specially as <u>moderate manner</u> &c for this being matter of law ought to be shewn to the court — 4 Bac. 61. 3 Lev. 41. Cro. E. 268. Esp. 318. 5 Bac. 202. Hob. 127 —

Doug. 108. 2 W. Bla. 143. Ld. Ry. 566. Sol. 278. Esp. 264. 5 Mod. 18. 2 Swift. 215.

The Court in its discretion may allow such plea in some cases as if the facts pleaded "may create doubt in the jury" 4 Bac. 623. Cro. E. 871. 2 Mod. 274. 3 Mod. 166. —

Pleading specially what amounts to the Gen. issue where not warranted <u>ut supra</u> is said to be a good cause of special demurrer but it seems that the Court may in discretion allow such plea — Wherefore? — 10 Rep. 95. 4 Bac. 60. 134. 5 Bac. 202. Cro. E. 112. 157. Imp. 308. 6.

3 Bla. 309. 5 Bac. 202. Hob. 127. Dougl. 306. Esp. 318. Cro. Ch. 157. Cro. Eliz. 208. 4 Bac. 60. 3 Lev. 41. Cro. J. 329. 4 Bac. 134. Esp. 418. 3 Mod. 166. 1 Ventr. 249. 10 Co. 95 & 94. Cro. Jac. 165. 318. 5 Bac. 202. 1.

According to other authorities it is no cause of demurrer but of a motion to the court that the Gen. issue or nil dicit may be entered — 5 Bac. 101. 2. Hob. 127. 1 Leon. 176. Cro. J. 164. 2 Mod. 274 —

Sol. Ry. 88. Sy. Salk. 394. 5 Mod. 18. Chitty. 197. 198. Carth. 356.

A special plea alledging what in evidence would support the Gen. Issue does not necessarily amount to the Gen. Issue Ex. plea of release to debt a simple (Y)

Pleas and Pleadings.

In Eng. if an action of debt on simple contract be brought the stat: of limitations may be given in evidence under the general issue of "Nel. Debet" tho' to an action founded on tort the stat: must be pleaded.

But in Con the stat: may be given in evidence under the general issue to both these actions; as also to the action of Asst. notwithstanding opinion is held by Swift. For this action is founded on a promise raised by a fiction of law in consequence of a duty is discharged, the promise is presumed never to have ~~taken place~~ been made at all.

The stat. of limitations; A set off; Bankruptcy Record and satisfaction must be plead specially, as these are matter of law which go to the discharge and not to the gist of the action. But a release and payment may be given in evidence under the general issue tho' Q. is no difference between these and the former - Tidd 370. 3 Bac. 518. Ld Ray. 102. Esp. 147. Chitty 197 & 198. (Ld. Ray. 866. contra tho' overruled.)

2d A special plea (i.e. one alledging new matter) announcing to the general issue is not proper but if it contains special matter ~~in avoidance~~ of justification (X) it is a good subject of special demurrer as in certain cases tho' not in all. Or if the court on motion disallow the plea or order the general issue to be pleaded and the Deft. will not plead it, but joins with the Pltff. in demurrer, the Pltff. having demurred thereon; Judgment shall be for the Pltff. - Or the Pltff. may take judgment by "nil dicit" in such case instead of demurring; for the court by ordering the General Issue pleaded destroy the special ~~plead~~ plea, so that in fact the Deft. has no plea on the record.

Remarks.

+ And in fact replies which admits that there was once a cause of action - or that the obligations in the Declaration are true accounts to the Gen. issue, tho' the facts pleaded might have been given in evidence under the Gen issue for in such case the defence *

(9) not over contract. 5 Bac. 62. 1 Saund. 76. Lutw. 356. Chitty 197. 8. Ld. R. 88. 9. Salk. 394. 5 Mod. 18. —

* in matter of law. Eg. Trover Court may to debt on bond plead the coverture to the action for she admits the facts but avoids them by matter of law so of a release &c Ld. Ry. 889. 566. 787. 4 Bac. 134. 62. Chitty 197. 8. Lucas. 871. Co. L. 282. 2.

Ld. Ry. 88. 89. 566. 787. Ld. Ry. 217. 4 Blu. 62. Co. Ely. 871.

Co. Ely. 871. Co. 9. 192. 10 Co. 88. 90. 9. 3 Bla. 309. 1 Vent. 9. 210. Plowd. 66.

Pleas and Pleadings.

It is not to be supposed from the above rule that pleading specially what would ~~is~~ evidence support the General Issue necessarily amounts to the General Issue. For a plea of payment or release to an action of Dbt. for example does not amount to the General Issue tho' the payment &c. must have been given in evidence under the General Issue — For a plea which amounts to the General Issue denies the material alegations in the Pltfs declaration, but this plea will deny none of them. As Release. Coverture. Duress. Infancy &c. These all differ material from an alibi which amounts to the Gen. Issue.

And hence it is in law that it is usual to plead ex post facto matter which abrogates the cause of action and which would ~~usual~~ support the General Issue specially to actions founded on contract. But otherwise to actions founded on Tort.

It is a General rule that, plea which admits that there was once a cause of action or that the material alegations in the Declaration are true amounts to the general Issue tho' the matter pleaded might have been given in evidence under the General Issue. Because it varies in point of form as the General Issue denies them in the first place and secondly because any special defence which admits the alegations in the declaration or that there once was a cause of action, but denies it now, is necessarily matter of law and ought to go to the court For this purpose it must be spread on the record — For this purpose is the only way in which the Court are supposed to know facts.

Remarks.

(o) This plea according to some must conclude to the country — According to others it may conclude ~~to the~~ with a verification but if it so concludes it is not "Gen issue with an 'ipsum'" but a special plea — 3 Reb. 26. Plow. 66 1 Vent. 210. 4 Bac. 62. Gilb 164. Hoy 112. Moor 30.

Co. Lit. 371.
Co. J. 122.
10 Co. 88. 90.
Yl. 3 Bla. 309.
1 Vent. 210.
Plowd. 66.
Salk. 274.
3 Reb. 26.
2 Mod. 244.
3 Ld. 166.

It may be demurred to even when it concludes to the country — See quere — Gilb. 164.

1 Vent. 210. Hoy. 112. Plowd. 66

Pleas and Pleadings.

Notwithstanding a special plea which amounts to the General Issue is improper, yet it is warranted in an assize or action of Trespass by giving color to the Pltff. As when the Deft. states his title specially and at the same time gives colour to the Pltff.; that is he supposes the Pltff. to have an appearance or colour of title, bad indeed in point of law, but of which the Jury are incompetent Judges — Matter thus specially pleaded must always be matter of law to come under the direction of the court. For when it is a mere denial of facts stated in the declaration, this cannot go to the direction of the court, for it must be disallowed. "Giving the Pltff. colour" is where the Deft. alledges in his plea some feined matter to allow the Pltff. some appearance of title, then stating his own title as better than his — Thus if the Deft. in an action ~~pleads~~ of trespass pleads that J. S. infeoffed the Pltff. of the land at a certain time without livery of seizen &c which is bad — And before that time he infeoffed the Deft. of the same land with livery livery of seizen which is good. But the Pltff. is not bound by this sham title of his which the Deft. has set up for he may shew a better in his replication — 10 Co. 90. 91. 3 Black. 309. 10 Co. 88. —

A special plea containing a statement of facts which go to prove the general issue and also concluding with the general Issue is good. (c) This is called a General Issue with an Essent. Thus if the Deft. pleads that the deed &c was delivered as an escrow to J. S. & therefore not his deed to be delivered to ~~J. S.~~ the pltff. on the performance of ~~a~~ certain conditions

Remarks

x or as he calls them speciale non est factum as they subject the Deft. to the onus probandi

Moor 30.
3 Rell. 26.
Gilb. 64. 65.

Gilb. Ev. 163
185. 5 Co. 119

6 Mod. 215.

Co. Lit. 195
232.

4 Bac 62.

Gilb. ev. 163.
4.

and that those conditions are not complied with so that it is not his deed; this would be called a non est factum with an Prout.

Such General Issue must always conclude to the country but according to some opinions, it may conclude with a verification, which is very absurd, or it then would not be the General Issue.

Pleading a General ~~with~~ Issue with an Prout is advantageous in some respects. As it points out the special grounds of defence and refers to the court the question of law arising upon them. And it seems that a General Issue with an Prout may be demurred to tho' it does not conclude to the country, because it is a mere inference arising from the special facts stated. And the Deft in such case is confined to the special facts stated in his plea for his whole defence.

Lord Holt says that all Gen. Issues with an Prout are imperfect, for the Onus probandi lies on the Deft. Anciently indeed tho' the Deed to was good in point of form, yet if it was originally void from something ex post facto as Forfeiture, Determination, &c the Deft. must have pleaded it with an Prout. But the rule is now altered and the Deft. may plead the General Issue in common form at present and give this matter in evidence. 5 Co. 119.

When the Deft pleads specially ~~the~~ a denial of any material fact which goes to the gist of the action and concludes to the country, he must demur to all the other parts of the declaration. And he ought to be this is decisive as it will be unavoidable.

Remarks.

Hob. 127.
Co. Lit. 26b.
32 H. 5 Bac.
2 Ch. 3 Bla. C.
309.

Stat. Con.
425. 3 Bla.
309.

Stra. 1022.
1 Lev. 142
Esp. 167.

3 Bla. 315.
Jr. 318.
Co. Lit. 126a

Pleas and Pleadings.

Thus he who pleads to an action of Trespass an Alibi pleads essentially the General Issue. But no question of law is raised by the plea. So if he pleads essentially the property in himself or a stranger. There would both be bad as no question of law was is raised and they amount to a mere Gen. Issue.

It is somewhat remarkable that in Con. we should have a stat. allowing the Deft. to plead specially a title in himself to an action of Trespass - when our Gen. Issue is so capacious; whereas at Com. Law this could not be plead as it amounts to their General Issue.

Not Guilty was formerly plead to Dft. as that was considered a species of trespass on the case which supposes a wrong & it is not now a void plea but has been holden good after verdict tho' it would be ill on a special and probably on a General demurrer -

In no case if the Issue properly joined unless the Similiter is added, or thus "And the Deft. or Plft. does likewise".

In Con. it is customary to plead other defences than those arising from the act of the Plft. specially to actions founded on contract - Yet every thing else supports our General Issue tho' by no means amounting to it in many cases - But to actions sounding in tort our practice is almost always to plead the Gen. Issue.

Of a Special Plea in Bar.

A special plea in bar is said to be one which admits all the

Remarks.

4 Bac. a. 70.
Dyer. 66.
Cro. Eliz. 418.
Poph. 101.

2 Vent. 79.
Cro. E. 30
Hob. 184.
Lev. 38.
Salk. 96.
4 Bac. a.
a. 273.

3 Bla. 309.

Doug. 88.
3 Bla. 309, 10
Re-
Coop. 578.

2 Burr. 772.
3 Burr. 172

Hardr. 332.

facts stated in the declaration and avoids them.

This rule however is not universally true, since it does not always admit the facts, but traverses a part of the allegations.

But a plea in bar always admits all traversable allegations which it does not traverse and is always in avoidance of what it admits. Hence the facts which are avoided are always admitted.

A special plea in bar always advances some new matter and is usually in the affirmative tho' not always, as it is sometimes in the negative. Unless however some special matter is alledged it is not a special plea in bar. The definition therefore which I would lay down is this. A special plea in bar is one which always ~~are which~~ always advances new matter in answer to the declaration, which admits all traversable allegations which it does not traverse, and is in avoidance of what it admits. Hence it always concludes with a verification in stead of closing like the Gen. Issue to the country because it invariably contains new matter. For until an issue is tendered each party may answer by denying, demurring or avoiding the previous matter. But if a special plea might conclude to the country, the party could not answer but he must add the similiter for this always tenders a regular ~~plea~~ Issue. N.B. Verification and Averment as used in this repeat are perfectly synonymous.

But pleas which form a complete issue must always close to the country — 5 Cow. 86. Ray 98.

Every plea in bar and every other plea admits of course what

Remarks.

(c) See Meyer vs McLain 1 Johns 504, 2 Johns 183. where it was held in action of debt on judgment & nil debet pleaded, that Pltff's going to trial on the plea was an admission of the validity of the plea

4 Bac. 88.
Hardr. 33.
332.

(d) so also Assault & Battery & Wounding; a plea justifying assault & battery only is ill. Esp. 318.
Ld. Ray. 229. 5 Com. 64.

x should it not be "subsequent"

Hob. 327. 8.
~~Co. Lit.~~ Co.
Sly. 267.
Esp. Di. 318.
Ld. Ry. 229.
2 Lev. 175.
4 Bac. 86.
12 Ev. 16.

Hob. 27.
4 Bac. 88

it does not deny. Since each party may deny it is therefore presumed if he does not that he admits. Since "Nil debet" is no plea to debt on bond ~~if~~ for the execution is admitted the right of action is in the deed itself and not from any collateral matter, & is left unavoided, therefore non est factum must be plead in order to dissolve the contract "eo ligamine quod ligatur" — (c)

Other general rule for pleading, is that the plea of the Deft. ought to be such as is pertinent to the quality of his case, estate and interest!!! But this is too general to be useful and proper.

1st The first general rule is that every plea in bar must answer the whole gravamen or gist of the action or it is ill, not only as to that which is omitted but in toto.

Thus in an action of trespass if the deft. pleads a release for one committed on a certain day, he must traverse all trespasses committed "before" that day — For the Pltff. may prove any one of a hundred of the same nature, as he is not tied down to the one stated on the day in the declaration. (d)

So also to an action on the case against a Bailee ~~from all obligation~~ to carry is ill for goods delivered to carry and to keep; a plea of release from all obligation to carry is ill for this ~~only~~ answers only one part of the gravamen — it does not answer his obligation to keep.

But a justification which answers the gist of the action covers all matters of aggravation — Thus in trespass for breaking & entering the Pltffs house and beating him. A plea which answers the breaking

Remarks.

3 T.R. 292.
2 H.B. 555.
3 Bla. 311.

3 Bla. 311.
3 Term. 292.
2 H. Bla. 555.

Comyn. 575.
Co. Lit. 303.
8 Co. 138.
Co. Dy. 149.
a. 16.
2 Vent. 256.
Cro. 25-6.
4 Bac. 91.
1 Sid. 215.
334.

and entering is sufficient as this is the gist of the action i.e. it is prima facie good if demurred to specially, it is good so with every other plea.

But if the Plff. means to rely on the beating as a substantive ground of recovery, he may do it notwithstanding by making a "Novel Assignment" in his replication.

Novel Assignment is when part of the matter contained in the declaration is assigned anew in the replication and stated particularly. As if A. sues B. for trespass committed on white acre in Litchfield. B. replies that white acre lies in Litchfield South farmer and in his close wherefore he entered &c. A. may reply that this white acre does not lie in Litchfield S. F. as the Deft. has stated but in Milton society in Litchfield and is his &c.

When that which of itself would support an action is stated in the declaration as mere matter of aggravation and the plea is given well, the Plff. cannot avail himself of this except by "Novel Assignment".

Anciently it was necessary for the Deft. to set forth all the particulars of his defence however numerous they might be if his defence consisted of special matter in avoidance.

But now he is allowed to plead generally to avoid prolixity & Lord Coke says that whenever the particulars tend to infiniteness the Deft. is allowed to plead generally.

Thus if in covenant consisting of several distinct ~~parts~~

Remarks.

† Repugnancy w' date no error 2 East 339

Dep. 305.
5 Com. 236.

Co. Eby. 232.
4 Com. 82.

Co. Lit. 304.
3 B.
4 Bac. 94.
2 East. 339

Pleas and Pleadings.

parts, performance of each would make the pleadings very lengthy, the Deft. may plead ~~generally~~ performance generally. But their are but few parts there must be plead particularly. As if a Deputy Sheriff giving bonds to serve all writs should be sued on there for omitting service, he may plead performance generally without naming any particular writ, tho' the defence consists of matter in avoidance only, for otherwise it would be impossible for him to plead well. But in common and ordinary cases he must plead specially.

In actions of ~~law~~ covenant broken the Deft. cannot plead performance where some of the covenants are in the affirmative and negative But in such cases he must plead that he has not done what he covenanted not to do. Co. 2. 303. Co. 3. 69 Bac. 91. 5 Cow. 286.

If however he plads performance generally advantage can be taken of it only by special demurrer for after verdict it is presumed that he proved to the satisfaction of the Jury that he did not do it.

So it will not only be good after verdict, but on a general demurrer.

Repugnancy in a material point vitiates the plea; but in parts not material it is not ill according to the maxim "Utile per inutile non vitiatur" For it is deemed surplusage which ~~either means~~ really means either foreign matter or immaterial repugnancy. x

(c) or in other words — A traverse properly so called is with an "absque hoc" and concludes regularly with a verification by Plea that the said John Stutes did seized in fee Replication that he did seized in fee "absque hoc" &c with a verification —

1 Salk. 195.
4 Bac. 67.
Co. Lit. 282.

Stra. 871.
1 Burr. 321.
Doug. 412.
5 Com. 109.
4 Bac. 67.
6 Rep. 24.
5 Com. 109
~~Stra. 871~~

※ It is true that it is said that a general traverse may conclude with an averment or to the country — sed Quere — How can it be proper to conclude with an averment when all the allegations on the other side are denied and issue tendered on them? Can the opposite party possibly make a special answer? See Bordon vs Rimson 1 John. 516. —

2 T. R. 443

Salk. 4.
Doug. 90.
Bull. N. Prius.
76. 2 T. R.
439. Doug.
412.

Of a general traverse concluding to the country Ex. Dessa propria injuria absque toti curia 5 Com. 98. 8 Rep. 66. 1 Bos & Pu 76 — 4 Bac. 67. 7 Mod. 105. —

2 T. R. 443 n.
5.

(d) Qu. Whether in these cases a wrong conclusion is ill upon General demurrer. 1 Vent. 240 — Roy. 94. Cro. E. 117. or 164.

4 Bac. 67.
T. Ray. 98.
1 Burr. 321.
2 T. R. 439.
2 Stra. 871.

Plea and Pleadings.

Of Traverse.

A Traverse may be taken in any stage of the proceedings pleadings and is a denial of some particular point alledged in the Pleadings, and always tenders an issue.

It is said by Coke that it close ~~on~~ the issue but it never does.

It is taken with the words "absque hoc" in Eng. "without this" and properly so called concludes with a verification singularly, and merely tenders the issue. This holds universally as to a special traverse. (c)

A general traverse which reaches the whole declaration concludes to the country; or may conclude with an averment probably the practice was such as to justify this remark but Mr. G. cannot see how it could with an averment. ✱

For since the traverse denies all the facts in this case it clearly is the proper time to close the issue.

A technical traverse differs from a direct and positive denial of a fact not only in the words but generally in the conclusion of a direct and positive denial must conclude to the country; but a traverse always concludes with a verification, except the General traverse as above.

Thus in usury after the Deft. has plead it - the Plft. may reply "that the contract was made on good and lawful consideration (& states what it was) &c "absque hoc" that it was then and there corruptly agreed &c" (d)

Remarks.

(x) Also. If Pltf. alledge that D.S. dis'seised in fee Pltf. replies that he dis'seized in tail he must have seisin the seizen in fee —

* But this rule is not universal and has been somewhat relaxed in modern times — Sha. 1177. Wms. 6. —

2 Sha. 871.
Co. Ely. 456.
1 Vent. 101.
Tom. Ry. 98.
4 Bac. 67.

Tom. Ry. 74.
Co. Lit. 117.
164.
Contra 1 Vent. 240.

Co. Ely. 50.
3 Bla. 310.
1 Vent. 218.
2 Mod. 68.
4 Bac. 67.
Ib. 70.
Dyer. 365.
1 Sid. 301

Pleas and Pleadings.

But he is not bound to state the consideration &c but may deny the Deft's allegations directly and positively, and then he must conclude to the country. But if he elects the first mode he must conclude with a verification, because he alledges new matter in stating a good consideration.

When the allegations of one party are directly denyed by the other, a formal traverse is needless and a good cause of demurrer. As when the Pltff. avers performance of a condition precedent, and the Deft. denies directly; if the Deft then proceed to add "without this" that he has performed &c - it is ill as a complete ~~is formed~~ issue has been clofed & then opens it again.

But subsita whether a wrong conclusion ought to be taken advantage of by a general or special demurrer - The better opinion is that it is ill on a general demurrer, tho' Mr G. thinks otherwise, because the plea is considered ~~otherwise~~ ill, not because it has not substance but because it concludes wrongly.

It is a general rule that when one party alledges new matter inconsistent with any antecedent allegations on the other side but which does not form any issue upon them, a traverse of these allegations is not only proper but necessary - As if it should be plead that J. S. is ded, and the Pltff. should reply that he was alive it would be necessary to add "without this" that he was dead.(*)

Or if it should be plead that J. S. died seised in tail and the Pltff. should reply that he died seised in fee, the rule is that he

Remarks.

(a) But the replication as it contains new matter must conclude with a verification — 3 Bla. 309

ut supra.

2 Stra. 1177.

2 Mod. 168.
Cro. J. 221.
4 Bac 70

Co. Lit. 126a

4 Bac. 678
Salk. 4.
Co. L. 136.

2 Mod. 60.
1 Saund. 43
44.

4 Bac. 70.

Co. Lit. 282.
Hob. 104.

Pleas and Pleadings.

must add "absque hoc" that he did seised in tail.

The new matter which precedes the traverse is called the Inducement.

The object of the last rule is to compel the parties to form an issue on what each alledges inconsistent with what has preceded. The rule however is not universal as it has been relaxed in modern times.

But when one party merely confesses what is alledged on the other side and avoids it by new matter a traverse would amount to repugnancy. Thus if one pleads infancy and the Pltff. replies a promise after full age and then adds "absque hoc" that he was under twenty one &c it is obviously ill — Plea Release Replication per fraudem — (a)

Where a traverse concluding with a verification is tendered, the issue is formed by the opposite party's affirming or over what is traversed and concluding to the country —

The omission of a traverse when it is required is said by some to be matter of substance and by others to be mere matter of form. There has been no question lately on this subject in Great Br. But Mr Gould believes it to be matter of substance. For what is not traversed is admitted and is in these cases the substance of the plea — As when the Deft pleads that P. L. died seised in fee and the Pltff. replies merely that he died seised in tail "without adding the absque hoc that he died seised in fee" the admits the last which is the substance of the plea —

There cannot be a Traverse upon a Traverse — This rule is founded in reason and necessity.

Remarks.

Ex. Deft. pleads that J. S. was seised in fee — Pltf. replies that he was seised in tail without this that he was seized in fee — the Deft must join and cannot traverse the seizen in tail for in this way they might answer ad infinitum — turn —

Hutt. 79.
1 Wms. 403.
2 Mod. 133.
4 Ba. 17.
73. 79.
5 Com. 119.
20.

Hob. 104.
et ut supra.

Plas and Pleadings.

A Traverse upon a Traverse is where one of the parties tenders a good Traverse and the other leaves it and tenders a new traverse upon the inducement of the former to the same point — that is going to the same ground of defence as the first — (a)

Thus in the Deft. pleads "that J. S. died seised in fee" and the Pltf. replies "that he dies seised in tail" absque hoc that he died seised in fee" — Here if the ~~Pltf.~~ Deft. rejoins "that the Pltf. ought ~~—~~ to be barred &c absque hoc that he died seised in tail" yet is ill because this is a new traverse taken on the inducement which goes to the same ground of defence as the first which was well tendered Viz — to prove that J. S. was not seised in fee.

In this case the Deft. in his rejoinder must join in the traverse tendered by the Pltf. otherwise they might never come to an Issue.

But a traverse after a traverse is good even tho' the first traverse is material.

But this is one which does not go to the same point with the former traverse; that is — it does not go ~~to~~ to the same ground of defence but to an other ~~one~~ — a different one —

As where the plea sets forth a release of a Trespass on the day and then transfers all other Trespasses before the date of the writ. Here the Pltf. in his replication is not bound to join on this Traverse, but may traverse the release and let the other transgs stand — because the release goes to a different matter and ground

Remarks

Hob. 104.

5 Com. 120.
4 Bac. 75.

Sta. 117.
Co. Lit. 282b.
1 H. Bla.
346a 46. 376. Bd.
406---
Co. 8. 99.
418.—

Carth. 116

Hob. 104.

Rph. 101.
Moor. 350.
Lut. 1437.
Co. 8, 104.

of defence from the traverse. But if he leaves this traverse and tenders another to the same point, he gives a traverse upon a traverse which is ill.

So in an action of trespass it is a rule that the Deft. should traverse all antecedent trespasses if he pleads a feoffment. In this case the Pltf. in reply may traverse the allegation of antecedent trespasses or the Feoffment itself — which is a traverse after a traverse for these are distinct and substantial grounds of defence —

To the general rule that there cannot be a traverse upon a traverse there are two exceptions 1st When the traverse tendered is altogether immaterial, the opposite party is not bound to except it, but may leave it and tender a new traverse himself upon the inducement to the former. As if the Pltf. should declare in Waste that the Deft. fell and sold his trees and the Deft. should plead that he fell them for repairs and did so bestow them "absque hoc" that he sold them — The Pltf. may reply since this traverse is immaterial that he let them not so without this that he employed them in repairs. But this is clearly a traverse upon a traverse; for it goes to the same trespass and ground of action — 2d The other exception is of no use in Lou. because it arises from the english law of Venue in transitory actions — As if in trespass at A. the Deft. plends a justification at B. and traverses all other counties absque hoc that he was guilty at A. then the Pltf. may demur the traverse tendered to prevent a foreign plea and the justification pleaded — For the traverse is immaterial, since the trespass by the English law may be laid in any county

Remarks.

(o) And if he does join when he is not obliged to the other party can take advantage of him for joining — 4 Bac. 68. note —

Salk. 91.

4 Bac. 73

Co. L. 126.
5 Com. 126
3 Bla. 311.
12.

3 Bla. 311.
5 Com. 126.
Co. Lit. 126.

and proved in any other.

The party to whom a traverse is tendered does not admit by joining in it, the inducement or the new matter alledged to be true for he is obliged to join in a traverse well tendered (c) — And if he admitted there, the system of pleading would become a system of chicanery and fraud to delude and perplex. But the inducement cannot be proved nor the new matter so introduced the parties are then at issue upon what has no connection with either the inducement or the other — To out of abundant caution a Protestando is sometimes used to avoid this admission, but this is entirely needless and irrelevant.

But on the other hand the party who tenders the traverse, admits of course what he does not deny. Hence it is a rule that the Pleader should deny all that is necessary to destroy the others right or his plea may be demurred to.

By a Protestando however he may avoid the admission so far as to restrict a future claim in an other suit. Mr Gould sees no necessity for the Protestando in any case — As the party closing the traverse is not supposed to admit what he does not deny without a protestation. And the party tendering it must admit the facts not denyed so far as it regards the present suit altho he does protest against them.

The Protestando merely prevents the record in the principle case from being used in an other case against the party protesting with respect to the allegations protested against. As if a

Remarks.

6Co. 24.
Carth. 217.
Comb. 321.
1Rob. a.
235.

3 Mod. 220.
Salk. 111.
Salk. 628.
Hob 103..
Cro J. 221.
4Bac. 683.

4Bac. 683.
1Bur. 320
1Bos. & P. 80
8

1 Burr. 320.
1Bos. Pull.
80. 8Co. 65.
a. 66.
B. & P. 93.

Pleas and Pleadings.

Lord in the time of Feudal tenures had been sued by his Villein and preferring to try the cause chooses to take no advantage of his Villeinage he may enter a prout stat tanto against his suing as he is his villein and then plead over to the action. This prevents the villein from improving their record in an other case to shew his emancipation in that, he has been permitted to sue his Lord but the Prout stat tanto cannot affect the merits of the present cause.

A traverse can properly be taken only on a material point, tho' it may be taken on any point. 4 Bac. 75. 2 Saund. 5. 2B.

By material point is meant one that is decisive of the cause. And if the traverse is not so taken it will be ill on demurrer for the issue will be necessarily immaterial.

Every traverse should also be taken on an issuable point, which is a material point of fact. Matter of recital by way of inducement is wholly immaterial & cannot be traversed. So no traverse can be taken to any matter of law. So also it must always be taken on a single point or a single ground of defence. Otherwise the plea will be ill for duplicity. But it does not follow from this that it must be taken on a single fact. As one ground of defence may include a vast number of facts. Thus in a plea of Usury, as many facts may be set forth as the nature of the agreement will admit of. Now the Plft. may traverse any one or all these facts, and still there will be but one single ground of defence. But if the Deft. should plead to an action on a contract instead of usury a Release and Infancy, the Plft. might

Remarks.

(O) 2y — In trespass if Deft plads a release he must traverse all subsequent trespasses; if a proffment all antecedent — if a licence all before and after — Exception to the two last if the justification in law on the day on which the trespass is alledged to have been done, the day being agreed —

2 Vent. 79.
Salk. 628.
9. 4 Bac. 79.
Yl. 68.

2 Saund. 1560.
905.

Hob. 104.
2 Mod. 68.
1 Id. 292. 4
294. Exp.
2 Id. 415.
Salk. 222.
Cro. E. 870 or
817 1 Rev.
2 Yl. 987.

2 Salk. 42.
1 Bulst. 138.
6. Ve. R. 17.
Id. Ry. 86.
7. Rep. 86

5 Bac. 207. 6
1 Bulst. 138.
Salk. 64.
Comyn. 161.

demur for duplicity but he could not traverse both in his Replication.

Nothing but what is alledged on one side can be traversed by the other; for it is the very nature of a Traverse to deny what is alleged on the other side. Thus in an action founded on a promise, if it was not written is comes within the stat. of Frauds & Perjuries, stat. as there is no averment of its being in writing, the Deft. cannot traverse this fact and so bring it within the stat. ~~it is will be special demurrable only~~

But it has been said by Sutwicke that if matter be traversed which has not been alledged on the other side this can be taken advantage of only by a special demurrer.

When one party justifies, or confesses and avoides only a part of the material alligations of the other, his traverse must be co-extensive with the part not avoided. (O) Or if in trespass the Deft. should plead a feoffment as this justifies only for all trespasses since, he must traverse all trespasses antecedent to the feoffment in order to cover the whole gravamen.

But there is one exception. Where the justification is pleaded on the day laid in the declaration, it is primafacie a good plea and covers the whole gravamen without an additional traverse, & if the Plff. would lay the trespass on an other day he must make a Novel Assignment in his Replication. 3 M. 311. 4 Bac. 125. Cro. C. 165. § 14, 15.

In law it is not the practice to make the traverse co-extensive with the part not justified, where a special is pleaded.

Remarks.

contra
1 Vent. 184.
2 Rebl. 87.

Co. Lit. 126.a
309.a 5 Rac.
201. 1 Leond.
196 or 156.
2 Leond. 197.

Co. 9. 82.
312. 4 Rac.
98. . .

Pleas and Pleadings.

Or if in trespass a licence should be pleaded. At Common Law he must traverse all antecedent and subsequent trespasses. But by the rules of our practice he is not required to do this, if he will aver in his plea that the trespass complained of and justified are one and the same & according to the later authorities this practice is now approved in the English courts; altho' there are different opinions upon it in the books.

In general a traverse or a direct denial pursues the terms of the allegations traversed, but this is not always proper altho' it is the most common way in this state. For if the Deft. should plead a release since the date of the writ; Pltff. cannot deny that it was his act and deed ~~before~~ since the date of the writ, For this is a negative pregnant and implies that it was his act and deed before the date of the writ In this case he ought to reply that "it was not his act and deed in manner and form &c"

Such pleading however is aided by verdict tho' advantage may be taken of it by special demurrer.

But in trespass unless the day is certain, a general demurrer will reach the defect, tho' after ~~demurrer~~ verdict this omission is no ground for an arrest. Hence it results that the verdict cures some defects which are reached by a general demurrer as well as those that are the subjects of special demurrer.

Remarks.

(o) Generally a traverse puisnes the time of the obligation haven-
-rod - But the more is not always right. Q. plea rehofusice
the date of the writ - Replication not his deed since he
can for obstructing three lights — traverse of obstructing 3 lights
These are negative pregnants on which and on affirmative
pregnant, no issue can be joined - It ought to have been "not
his act in manner and form" R But such pleading is
avoided by verdict till only on special Demurrer -
4 Bac. 98. Co. L. 126. 303. 1 Root 88. 5 Bac. 2 610 201. 2 Leon. 197.
1 Leon. 186 — Cro. J. 87. 312 -

Pleas and Pleadings.

Of the Inducement to a Traverse. This is usually a mere piece of formality calculated to distract and perplex the young pleader. Merely can be of no use since the opposite party is not obliged to plead to it. But whenever a traverse is well tendered the opposite party is obliged to join in the issue.

Thus if to an action founded on contract, the Deft. should plead merely "that it was then and there completly agreed &c." If the Deft. should reply that "the contract was made on a good and lawful consideration". (stating the whole is a long inducement) without this that it was completly agreed &c. The Deft. in this case must merely rejoin "that it was completly agreed &c" over again without noticing the inducement. Of what use is it then? it answers no purpose whatever but to usher in the traverse, generally speaking.

True it may be useful in a very few cases as where the party would improve a technical inducement to a traverse for the purpose of protestation. And likewise where the inducement and traverse are designed to go to different points the inducement may be necessary; as in case of a traverse after a traverse where a licence is pleaded and all other trespasses denied. But in all other cases Mr G. would advise a student to be aware of a technical traverse.

(o)

Of Duplicity.

Every plea must be simple, entire, connected and confined

Remarks.

Duplicity is a fault in all except dilatory pleas. Other are exceptions. Co. L. 304. 4 Bac. 114. 3 Bla. 311. 5 Cow. 86. 55. Hob. 295 —

3 Bla. 311. Co. Lit. 304. 5 Cow. 65. 1 Burr. 320. 4 Bac. 354. 5 Cow. 65. Co. Lit. 304. Co. L. 303. 4 Bac. 114.

* But giving different answers to different parts of the declaration do not constitute duplicity. Co. L. 303. 4 Bac. 118.

Ex. Traverse of one part — special matter in avoidance of an other — to — Co. L. 304. 4 Bac. 118. 119.

Duplicity not allowed because it tends to unnecessary prolixity and confusion & vexation — 4 Bac. 119, Bland 194. Cyclo. 13. Ohio 47, 8.

3 Bl. Ab.

V. F. A. 894, 8 Co. 87. Cowel. 33 B. 1 Sw. 101. 3 Bla. 295.

1 Salk. 175. Dyer. 42. 1 Kell. 661. 4 Bac. 119

to a single point; that is it must contain only one single point of claim or defence. Yet this single point may consist of any indefinite number of facts.

A violation of this rule works what is called duplicity.

A double plea is one which consists of several distinct and independent matters alledged to the same point and requiring different answers.

It is essential to a double plea that these distinct matters be alledged to the same point.

Distinct counts in one declaration tending to establish one right of recovery do not constitute duplicity.

A count is a narration of the facts which constitute the cause of action or ground of complaint. It is sometimes called an exposition of the writ.

When there are several distinct complaints or causes of action inserted in one record, each one of them is called a count and all of them taken together constitute the declaration; but tho' the insertion of several counts in one declaration does not amount to duplicity, yet if any of the counts contain several distinct and independent matters requiring different answers it may be demurred to for duplicity.

Different counts inserted in one declaration which require different pleas and different judgments wholly vitiate the declaration so that judgment may be arrested for this cause.

Surplusage can never make a plea double for there must be two distinct and material matters alledged in order to make it

Remarks.

* or those which arise ariseth ex contractu & those which arise ex delicto — as Trespass & Assumpsit in two counts — such misjoinder is fatal —

Selk. 219. or 219. 6 Ph. Ed. Ry. 332. 7 Ph. 1 Mod. 7. 1 Sev. 76. 1 Wilk. 219. Cro. El. 210. 5 Com. 36.

Selk. 10. Com Ry. 232. 8 Ann. 19. —

Cro. Car. 140. 20. 1 Vent. 365 or 355.

5 Com. 36. 4 Bac. 134. & 2 Vern. 198. Com. Rep. 137.

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double. ~~no or two distinct defences if one is frivolous or not pleable~~

So if the Deft. plead two defences one of which is frivolous, his plea is not double.

Advantage can be taken of duplicity only by demurrer special demurrer; which as has been observed must point out the particular in which the duplicity consists. Or as Lord Holt says, the party demurring must lay his finger on the point very point — 4 Bac. 2. 113.134. Bro. Con. 14. or 20.

This rule however does not apply to those cases where the Pltff. joins in his declaration distinct causes of action, which according to the rules of declaring cannot be joined,[x] and which he relies upon as forming distinct and substantive grounds of recovery. In these cases the declaration is ill even after verdict — 4 Bac. 11. 17. Rep. 274. 8 Rep 87. Cond. 338.

But there are cases in which you can take advantage of the Pltfs. stating different causes of action of different natures in one declaration only by special demurrer.

Cases which fall within these rules are those in which the Pltff. (tho' he joins different causes of action which according to the rule of declaring cannot be joined) in which the Pltff. relies only upon one ground or right of recovery, as in the cases cited from Coke and Dunlier in the margin.

In debt on a penal bond the assignment of more than one breach of the condition, is duplicity at Com. Law, for one breach works a forfeiture of the whole penalty at Com. Law it is there=

Remarks.

(o) 4 Vesey. Jr. 351. 2 Johns R. 96.

5 Com. 36.
2 Saund. 319.
4 Bac. 181.

(x) Upon oyer the party is entitled to a copy of the whole deed — witnesses names & all memorandums subscribed and indorsed upon it — not entitled to condition of a bond unless demanded —

4 Bac. 181.

The adverse party when entitled to oyer is not bound to plead without but if he does he waves his right to oyer —

2 Bla. 22.
Appen. XXII

4 Bac. 109.
113. — 6 Co. 98. a. 98.
10 Co. 93.
5 Com. 128.
Hob. 220. —
5 Com. 128.

(y) Ex.

Bromley
249. Chitty
185.

1 Bulr. 119
6 Co. 98.
10. Co. 143.
Styles 459.
4 Bac. 110.

Plea and Pleading.

=for unless to assigne more —

Tho' in an action of covenant, the Plff. may assign as many breaches as have happened, since he can recover no more for no more than he assigns.

Now by stat. 4 & 5 of Anne a Deft. may with leave of the court plead as many distinct defences as he pleases to one action —

This stat. comprehends none but pleas to the ~~Pltf's action~~ declara=tion. 4 Bac. 121. for Deft. may not plead ~~two pleas to the~~ two rejoinders to one replication — nor Pltf. two replications to one plea in bar (1) —

Of Making Profert and Praying Oyer.

It is a general rule in Eng. that where a party pleads a deed and claims title under it, he must make profert of it that is he brings into court the deed aforesaid. And this avowment is called making profert in Curia.

There are three reasons for making this profert 1st That the opposite party may have oyer of the instrument. 2 That he may take a copy of it & ~~thirdly~~ 3 That the court may inspect it. &c

The English rule does not require ~~does not require~~ a profert of Bills of Exchange or Promissory notes. But in Com. profert is made of them as of bonds.

The rule therefore that "when a written instrument is pleaded the party must make a profert" is not universal — for where the right acquired by deed will pass with=out the deed ~~this is not necessary~~ he who claims the right is not obliged to plead the deed — (1)

Thus at Com. Law a parol assignment of a lease was good

Remarks

† Ex. particular tenant & mandu mon. - Qu. as to the extent of this rule — Co. L. 267, 317 —

6 Co. 38.
2 Mod. 44.
6 Rep. 38.

Mon. 870
Plowd. 149.
2 Show. 418.
10 Co. 94. 92.
3 Dev. 83.
4 Bac. 111.

* If Deft. is party to an indenture he ought not to demand over but set it forth himself - If Pltf. gives over in such ca. imperfectly it is at Deft's peril — Salk. 498 —

Jenk. 305.
Co. Lit. 225.
5 Co. 75.

4 Bac. 110.

5 Co. 74 & 75 &
5 Co. 3 Term. 151.
1 Wils. 16.
Stra. 1186.
2 Hen. Bla.
263. 1 Root.
541. 2 Dr. 482.

4 Bac. Ab. and therefore according to this rule the party pleading the assignment it need not make proofs of it or show that it was by deed. But on the other hand where the right will not pass without the deed, he who would plead the right must make proofs of the deed.

But even in the case where a right will pass without deed, yet if the party will plead the deed and make title under it, he must make a proofs of it. On the other hand if he pleads the deed but does not make title under it, he need not make proofs of it.

But a stranger to a deed may always plead it without a proofs but parties and privies must make proofs in all cases where the possession thereof to decide must do it. Mr Gould considers this rather as a hard rule. Co Lit. 264, 304. 10 Co. Rep. 92. 94. A stranger is not supposed to be privy of the deed.

The rule is the same as to one who acquires a right by operation of law. He need not make a proofs in pleading a deed to one from whom his right is derived. Dyer tenant in dower. But this rule does not hold in case of a tenant by the curtesy for he is supposed to have possession of his wife's deeds. 10 Co. 94. Co. Lit. 126.

The general rule is subject to an exception when the deed is lost by time or accident, or if in possession of the opposite party it is not necessary for the party pleading it to make a proofs, but he must in his plea state the ~~facts~~ special facts why he does not make a proofs. It is not sufficient to have this appear in evidence. If however in these two cases he should make proofs of the deed, he would

Remarks.

10 Co. 92.
8 T.R. 573.
6 Co. 57b.

1 Root. 56.

Co. J. 32.
Co. Ely. 21.
Hob. 301.
4 Bac. 119.

Dep. Rep. 50.
Roke Rep.
165. Chitty
251. 6

be required to produce it in evidence as he would fact.

When the deed itself is only matter of inducement to the action or defence, it need not be pleaded with a profert — for title is not made under it.

And in Con. it is never necessary to make a profert in any case, for the opposite party may always demand Oyer whether profert be made or not. Altho' it is more necessary in Con. to make a profert as in the rule still it is our constant practice to do it as tho' we were obliged to.

According to the common law the omission to make a profert when requisite is matter of substance. But now by stat. 16 & 17 Car. II and 4 & 5 of Ann. it is matter of form only and and can be reached only by special demurrer — 4 B.R. 440.

When the deed is lost by time or accident or in the hands of the opposite party he who pleads it must prove the contents of it or he may produce a sworn copy of it. The contents of the deed may be proved by parol. But before he will be permitted to prove the contents, it must be made to appear to the Court that it is probably lost. The mere suggestion of the party that it is lost will not be sufficient it may be rendered probable in a variety of ways as proving that his house has been burnt with his papers in it 1 Atk. 446.

If the deed declared on is in the hands of the Deft. the Pltf. must in the first place give notice to him to produce it, and if on such notice he does not produce it, the Pltf. may then prove its contents.

Some further rules of Oyer — 1 Profert of a deed being made, the adverse

Remarks

(a) oyer new not be given if profert is made unnecessarily Salk. 497. Party of whom oyer is demanded is bound to convey it to adverse party — 2 J. R. 40 —

& Ex. one pleads in bar a feoffment in fee, and in his rejoinder varies his title or mode of acquiring it, as by pleading a gift in tail, a recovery by bafe and release Str. 442.

Bub. M. P. 14. & Com. 99. 123. Ray 22.. 4 Bac. 118. 3 Bla. 299. —

Plowd. 4. 105. a. Dy. 30 b. 4. Com. (or Ld.) Dy. 1449. Stra. 402. 2 H. Bla. 280. 4 Bac. 122. 3. 3 Bla. 310 Co. 2. 303. 4.

1 Lev. 51. 1 Rebl. 376. 469. 5. 12. 3 Lev. 48.

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party may always crave oyer of it. (c) Which anciently consisted in merely hearing it read, for the great body of the people were then unable to read. But in modern times Oyer means something more viz that that the party craving it may take a copy of it and that the court may inspect it. 3 Bla. 299. 4 Bac. 118. Hob 217.

On Oyer granted, the party craving it may enter the deed verbatim on the record and in this way may take any advantage of it. and this is the case generally with a penal bond thus to take advantage of the condition of it. for if the condition should never appear the obligee might recover the whole penalty, but after reciting the condition the obligor may then plead performance.

Oyer is to be obtained ordinarily by moving the court for that purpose but the practice in Con. is for the opposite party to demand it and the party and the party having it produces it without any motion to the court on the subject. 3 Bla. 299. 4 Bac. 130.

Departure.

A Departure will vitiate a plea. By Departure is meant a deviation of a former defence for an other which is distinct from the former and which does not tend to forty or support it.

So if the matter first alledged by one party is pleaded as at Com. Law, a subsequent plea ~~having a statute right is a departure~~

Remarks.

(C) Ex. Action on indenture of Apprenticeship – Plea infancy – Replication, custom of London is a departure – 4 Bac. 123. 3 Lev. 48. 4 Bac. 123.

* Sophia, Infancy, Replication nefariis – Rejoinder relapse is a departure – 1 Lev. 81.

(P) Qu. Writ aided by verdict. I think it would be if it contains in itself a good & sufficient ground – for on the supposition enough appears on the whole record to entitle the party to judgment – Ray. 46. 4 Bac. 125. 1 Keble 566. 5 Com. 99. Co. Litt. 304. Salk. 222. 6 Mod. 115. 4 Bac. 125. a. 123 – Salk. 221. 2 Ray. 22. 86. 94. 3 Lev. 90. Cro. Car. 165. a. 224.

2 Ray. 86.

Sp. 450. Salk. 178. 379.

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supporting it by special custom is a Departure — or variance — (O)

So also where a right is originally pleaded as at Common Law a subsequent plea shewing a statute, waive right is a Departure —

If one plead a statute in his own favor and the adverse party plead that such statute is repealed, the former may reply that it is revived and it will be no departure — for it fortifies the original grounds. 4 Co. 123. 1 Lev 81.

In an action on contract if the Deft. plead payment or performance & Pltff replies he has done somewhat and in a subsequent plea Deft plead tender or offer to pay or performance & that Pltff refused to accept it is a Departure — For a tender is quite diverse from a payment or performance. *

A Departure is so fatal a substantial fault, that it is a proper subject for a General Demurrer — And Mr Gould supposes that the defect is not aided by verdict — (P) Indeed it has been decided in Con. by the Superior Court in the case of Mr Comab & Fowler that this defect was not aided by verdict This judgment was affirmed by the Supreme Court of Errors in the same case —

In a case in Thom. Rayn. 86 the court held that the defect was cured by verdict — In that however the departure arose merely from laying a different ~~a different~~ day in the Replication from that in the Declaration and as the day laid in the Declaration is mere matter of inducement it was an immaterial variance —

When an ~~issue~~ issue is joined on an immaterial fact and the court cannot know from the verdict for whom to render judgment a repleader will be awarded —

Remarks.

3 Bla. 314.
Co. Lit. 47b.
4 Bac. 129.
5 Com. 138.
3 Bla c. xxiii

3 Bla. appen.
23.

5 Mod. 132.
Co Lit. 72a.
5 Com. 139.
1 Wils. 248.
Hob. 190.
or 191. Salk.
218. H. 56.
2 Saund 379.
or 279. 380.
Hob. 56.

4 Bac. 137.
3 Ser. 124.
Co. Cor. 25.
or 35.
5 Com. 139.
1 Wils. 248.
Salk. 218.
2 Saun. 279
Hob. 56.

Pleas and Pleadings.

Demurrer.

A Demurrer is a plea which admits all such matters of fact as are alledged by the opposite party and are well pleaded - but denies their sufficiency in law. Thus taking the question of law arising upon them from the jury and referring it to the court -

Strictly speaking this is no plea but an excuse for not pleading - As appears from the form of the Eng. Demurrer "And he is in no way bound to answer thereunto" &c - 4 Bac. 129, 30. 3 Wil. 4, 132.

The word Demurrer Lord Coke derives from demorar or demorari to delay as the parties always always stop pleading at a demurrer & in this derivation he is followed by all the later writers -

A Demurrer may be taken to any part of the pleadings - Hence it is not a plea which can be classed under any specific head - To any avernment it may be taken or to any plea, dilatory or in bar - 4 Bac. 131.

Altho' the demurrer admits the facts alledged by the opposite party, still it admits only such as are well pleaded - As if in Covenant the Plff. should assign several breaches and some of them ill - If in case of a demurrer it should be adjudged insufficient the Judgment would refer only to those well alledged - Hence several inferences are - 1st The Demurrer never admits or confesses an avernment which contradicts which already appears certain upon the record - As if one should plead a record and then should make an avernment contra-

Remarks.

1 Sid. 10.
5 Com. 139.
Cro. C. 250/35.
2 Lev. 124.
1 Sid. 10.
5 Com. 139.
6 Co. 44a.
2 Wilr. 376.
Jelv. 192.

5 Com. 139.
Salk 561.
4 Bac. 131.

(c) Eg. "Prout in hunc licuit" in a plea of justification —

Arb. 56.
4 Bac. 131.

5 Com. 139.
1 Show 213.

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dictory to it – And the other party should demur, this would not confess the averment. 2d Neither does the Demurrer confess in any instance an averment of what is impossible – 3rd So also it never admits facts which are not legally provable – Indeed the averment of such facts is itself a good cause of Demurrer – Thus if in debt on a bond the Deft. should plead a ~~paid~~ release this is not confessed by the Demurrer – 4th A Demurrer never admits immaterial nor impertinent averments. Thus if in declaring ~~on~~ on Assault & Battery the Pltff. should aver that the "Deft. drefsed in a read coat &c and beat him" the ~~fact~~ &c could not be confessed by a demurrer –

Indeed it is laid down by Comyns that a demurrer admits only such facts as can be properly averred – This rule is correct taken as Comyns meant Viz: that material averments are all which are admitted by a Demurrer. Yet it is not necessary that these facts should be traversable in order to be confessed since many facts which go to the gist of the action are not traversable by plea – As in an action for keeping a malicious dog the Scienter is necessary to subject the owner, yet this is not traversable by plea, by reason of the mode in which it was stated – Viz – Adverbally – thus "The Deft. knowingly &c" I know of no other reason for it – 5th The demurrer never admits ~~of~~ conclusions ~~drawn~~ of law drawn by the adverse party from facts stated – it admits matter of fact only – on the record (o) For if so then a special plea could hardly ever be demurred to – 6th So it never admits the "prohibitive limit" (as by law he had a right to do" ~~and so~~ &c) in actions of trespass and in a plea of jurisdiction –

After an issue in fact is joined there can be no Demurrer, for that

Remarks.

3 Sla. 319.
315. Cobitt.
126 — 4 Bac.
34. 129.

5 Com. 136.
4 Bac. 130.
Cobitt. 70.
125 —
Palmer. 517.

Selk. 219.
Stra. 574.
4 Bac. 130.
5 Com. 136.

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close the pleadings. But any party may demur to an issue tendered - As to a Demurrer &c which always tenders an issue -

A Demurrer is frequently stated in the books an issue in law but this is incorrect since it merely tenders an issue but clearly does not form one, as it regularly consists of ~~a negative and~~ affirmative and negative - Quere is not this rather a nice than a useful distinction.

If one party demurs to a part and traverses a part of the allegations the demurrer is first regularly to be determined so that if this adjudges an insufficient plea, the Jury may assess damages on all the parts of the plea at once - This however is discretionary with the court as they can order the traverse to be first tried -

In Con. this is wholly immaterial as the court itself will assess the damages ~~on~~ on the Demurrer if the Jury are gone -

When an issue in fact and and an issue in law are both joined in one cause, if the issue in law is decided in favor of the Pltff. he may enter a non pros as to the part traversed and take damages only for the part demurred to - As where there are several breaches in a covenant assigned & one is demurred to, the Deft. may enter a non pros as to all the others. So if the issue in fact is tried first the Pltff. may enter a non pros as to the Demurrer.

In Eng. if ~~the~~ the Pltff enters a non pros to any part he can never sue again for the same causes. But in Con. he may sue again after a non pros to the whole, & or after a retraxit as well as if he merely suffered a non suit -

Remarks.

4 Bac. 131.

Salk. 219.
~~[illegible]~~. Comb. 306.
Ld. Ray. 20.

Com. 306.

3 Bla. Rep. 23. 4 Bac. 130.

(a) But in prosecution for felony or any capitate offence the prisoner may plead ~~over~~ after his demurrer has been over ruled — C. Eliz 195. 4 Bla. 33. 334. 338. 2 Hawk. 334. 2 Hale 289. 257. 315. 243. 244. —

Quk. 360
Dyer. 69 ~~344~~.

1 Rol. R. 89.
11 Rep. 60.
Cro. El. 196.
2 Haw. 334 —

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It is a general rule that there cannot be a demurrer to a demurrer. And it is said that he who demurs to a demurrer is guilty of a discontinuance.

To this there are one or two exceptions. Lord Holt says that whenever a demurrer to a plea in abatement is apposite the plea may be demurred to and so it is laid down generally by some writer that a demurrer may be demurred to for duplicity. The first of these exceptions unintelligible and the last is ridiculous for in all special Demurrers as many causes may be assigned as the party demurring pleases — or to first exception — proper see 5 Bac. new edition 459, note

A Demurrer can never raise an immaterial issue; the form in Lou. is much more simple than the Engl. The last usually has a verification. Of what use this is no one can tell.

In all civil cases the Judgment on a demurrer is in chief, i.e. peremptory except a demurrer to Dilatory pleas in such cases a respondeat ouster is awarded.

The rule is the same in criminal cases where the offence charged falls short of felony. But if the criminal demurs in such cases, it is at his peril. (C)

Amendment is sometimes allowed after a General Demurrer is adjudged sufficient, but it is always before judgment is entered up. This does not militate against the general principle, that the Judgment on a Demurrer is in chief. This was decided by the superior Court in Fairfield county in the case of and two or three cases may be found in the Eng. books fragmentary one case in Term Rep.

Remarks.

4 Bac. 334.
Ed. 223. Co. Ch.
196. 2 Hawk.
334 – contra
2 Hale P.C.
247. 248. 315.

× for assigning a cause (if the cause be general) does not make the demurrer special – 2d "That the declaration is uncertain and wants form" – This is a general demurrer – 4 Bac. 132 –

1 Wms. 219.
Comb. 2. 94.
2 Ld. Ray.
798. 1 Show.
242 –

1 Vent. 240
2 Burb. 267.
4 Bac. 232.

(oo) ~~that if the omission of such things or are material to the right of action or defence~~ –

~~5 Mo. 218.~~
4 Bac. 132. 3.
10 Co. 88.
Litt. 138.
Hob. 127. 164.
Co. Lit. 92a
Salk. 291.
~~Vent. 240.~~
~~Co. 72.~~
Vet. 15.
3 Mo. C. 318.

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The current of authorities and the better opinion is that in cases of Felony if the Demurrer is overruled which was put in by the prisoner he may still answer over. But if the Peremptory demurrer is overruled judgment is given in chief. There is however a difference of opinion.

Demurrers are either General or Special.

General Demurrers assign no particular cause. Special Demurrers point out the special defect on which they are founded. In the latter case the cause assigned must in itself be special for if the cause is general the demurrer is not special but General. 4 Bac. 132. Co. L. 172. X

Anciently in Eng. Demurrers were always Special and Coke advises practicioners always to use them. They are attended with some disadvantages, but are unquestionably useful where there is the least doubt whether the defect demurred to is matter of form or matter of substance for a General Demurrer is dangerous in such cases.

A Special demurrer reaches all defects which a General Demurrer can, and many which that cannot. The rule of discrimination is this or seems to be this. All substantial defects (00) are reached as well by a General or a special Demurrer. But defects in point of form merely are reached only by a special demurrer.

A substantial defect is the omission of anything material that is which goes to the right or gist of the action.

A Formal Defect is the omission of form in alledging what is mate=

Remarks.

7 Mod. 71.
Hob. 282.
2 Ld. Ry. 792.
2 Str. 1002.
Co. L. 303.
4 Bac. 2. 183.
Hob. 164.

Hob. 282.
, 283.
Sk. 301.
Plowd C. 66a

Hob. 183. 184
232. 301.
Chit. 792
3 Bla. 394.
Sta. 624.
Cutt. 389.
1 Com. 138.

10 E. 88.
4 Bac 132.

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-cial. Matter of form includes every thing which refers to form only merely —

In all pleadings there are two indispensable requisites 1st the matter alledged must be sufficient in itself 2d It must be alledged according to the forms of law — the want of either of the requisites is a good cause of demurrer, of the first a general demurrer is proper and of the ~~special requisite~~ second requisite a special demurrer —

Hobert says "the omission of that without which the "very right" does sufficiently appear, tho' not alledged according to the forms of law is mere matter of form. And the omission of that without which the "very right" does not ~~appear~~ sufficiently appear is matter of substance" As if the Plff. in debt on bond omits to allege his performance of a condition precedent or omits to ~~reference~~ in the Plff. in certain cases this is matter of substance for it goes to the gist of the action. But if in transitory actions the venue is omitted to be laid this is mere matter of form for it is quite immaterial as to the merits of the case. — Duplicity — Specially plea or advantage to Gen. issue also this rule of Hobarts is only a different modification of the one which precedes it in more simple language —

When there is a total want of substance in any part of the pleadings as if one should sue an other for treating him with incivility or where an immaterial allegation is omitted (as if Plff in trover omits to state ~~the~~ property in himself, or possession in trespass) ~~by a plea in bar~~ — In either of these cases a General demurrer is proper for in both cases the defect is substantial —

A special demurrer reaches no other formal defects than such as are specially assigned for cause of demurrer — But altho' it is confined to such formal defects still it reaches all substantial defects and they may be taken advantage under

Remarks.

6 Co. y. 4
Co. Cas. 25. a
35. 6 Mod. 20.
3 Wils. 304
2 Mod. 318.
Esp. 105.
3 Mod. 1.
T. Ray 472.
4 Bac. 116.
Hut. 81.
4 Bro. 115.

(x) which is incurable in the second for here the grounds disclosed are different & the Plff. has failed not on the legal merits of the cause —

6 Co. y. 4
Co. Cas. 25 a
35. 6 Mod.
20. 3 Wils.
304. 240.
Esp. Dig. 105.
a. 164. 2 Mod.
3 Bro —

Co. Elz. 668.
6 Co. y. 4

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it, tho' not specially assigned for cause — so to defeat ~~not a pjud~~ it is but a gen. Demurrer —

If on a demurrer to the declaration judgment is given for the Deft. it is an established rule that no similar or concurrent action for the same cause and on the same grounds as are disclosed in the first declaration, can be afterwards brot; as if one should sue for breach of contract and judgment should be rendered against the Pltf. on Demurrer he could not bring an other action for the same breach of the same contract in the same manner, for this would "tend to infinitenesse" as Lord Coke says hence it is a rule that no final judgment can be overhauled by an other original suit.

But it is otherwise where judgment goes against the Pltf. on a demurrer, founded on the omission ~~of a material~~ of a material aligation in the first declaration. As if in Trespass he should omit to state property in himself — For here he might bring ~~the action~~ an other action inserting the material aligation omitted before which is a distinct substantive ground of recovery and therefore it is not brought on the same grounds as before —

So also when the action is clearly misconceived as if Trespass is brot where Trover alone lies the Pltf. may bring an other action tho he has gone out on a Demurrer — For the rule requires "similar or concurrent actions" and in this case from the very supposition the actions are not concurrent — 2 Bl. 6.779. 827. Co. Lit. 667. 8. 1 Saul. 169.

The rule applies as well to cases where the Pltf. failed on the General ~~Demurrer~~ Issue ~~or a Plea in Bar or on a Demurrer~~ special plea in bar or failed on a

A Judgment in a real action against the Pltf. however is no

Remarks.

Skin. 120.
6 Mod. 207.
4 Bac. 186.
a. 116.

(a) Ex. declaration insufficient. — Plea in bar & replication both good Demurrer to replication — Judgment must go for Deft. But in debt on bond for performance of covenant on award &c if Deft. plead an insufficient plea and Pltff. in his replication assigns no ~~different~~ sufficient breach Deft shall on demurrer have judgment tho' the declaration is good and the plea ill in these cases the cause of action does not appear tho' the replication is given — 3 Rep. 52. 8 Co. 81 d. Palm. 287. 2 Bulst. 94. Cro. J. 133. 221. Ld. Ray. 1080. —

Hob. 56. 199.
200. Gilb. 110.
3 Co. 433.
Salk. 498.
Id. 640 —

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bar to an action of a higher grade but to establish the same right — for they are not "similar". This however cannot obtain in Con. for we have but one real action and the rule therefore must be the same as in personal actions — We have no such fictitious action as the Eno. Ejectment —

But altho' the declaration is insufficient yet if the Deft takes no advantage of the insufficiency but proceeds to plead something in bar which is adjudged sufficient — The Pltff. cannot bring an other action altho' he might if the Deft. had demurred, but now the real merits of the case are tried & in the words of Hobart "the very right of the matter is bound between them"

A demurrer reaches back thro' the whole of the record and attaches on the first defect in the Pleadings — For an Issue in law refers the sufficiency of the whole record taken together to the court — (a) And tho' one point which is material may be found for the Pltff. yet in many cases must judgment be rendered in favor of the Deft. where the whole record for the first defect in the Declaration — In consequence of this rule we find in the books constantly frivolous pleas given in by the Deft. to cajole and decoine the Pltff. who generally demurs to the plea and thus is ensnared into an examination of his declaration without notice or preparation —

There is some contradiction in the books as to the mode of rendering Judgment in such cases — It is said by some that when Issue is taken on the Rejoinder for instance, and the Pltff. says that this is insufficient — the Deft. that it is — This is the only issue which the court can try; and judgment must go according to the issue —

Remarks.

3 Co. 52. 3 Co.
120b.
2d. 138b.
Palm. 237.
2 Bulst. 94.
Ld. Ray. 1080.

Pleas and Pleadings.

But We could think that the judgment ought to give the true opinion on the Court; and in such cases ought to be that "This Court consider the declaration insufficient" &c on the principle that a demurrer really puts in issue every part of the record, which is a fundamental maxim of the Eng. Law. And this is the practice in our county and Superior Courts Latterly – for this reason – that it is improper to send a false record to posterity & if in such cases the court says on the record that the rejoinder is good when they merely mean that the replication is bad, it certainly leaves a false principle on the records of the courts to be examined by those who come after them –

To the rule that a Demurrer attaches on the first defect in the record there is one solitary exception – In Debt on a bond conditioned for the performance of covenants or for any other purpose – Altho' the Deft. pleads an insufficient plea yet if the Pltff. does not make a good replication, the Deft. on a Demurrer shall have judgment –

For the true and real cause of action does not appear on the record until the replication. As the Pltff. only sues on the Penal part of the bond – And entit oyer prayed and the replication, it appears to be a single bill – The replication therefore in this case is considered a part of the Declaration itself or rather a supplement to it –

Thus have considered and finished the subject of Demurrer to the pleadings we shall next consider Demurrer to the Evidence.

Remarks.

Allen. 18.
7. or Ed. R. 404.
C. Ft. 92.
B. U. P. 213.
4 Bac. 138.

1 Root. 570.

2 H. Bla. 505.
m. 205. Doug. 360.

2 H. Bla.
205.

Pleas and Pleadings.

Demurrers upon Evidence.

In certain cases where the pleadings are joined upon an issue in fact, one party may take the examination of it out of the Jury and put it to the court by demurring to the evidence adduced ~~on one side. As the party demurring~~ by the adverse party to support his issue.

A demurrer to the evidence extends only to the evidence adduced on one side. As the party demurring may not put his own evidence on record & ask the Court to determine which preponderates in the scale of probability. For it is a general rule that demurrers to the evidence must be taken before the party demurring adduces his evidence.

A Demurrer to the evidence always goes to its relevancy and the relevancy is always matter of law to be decided by the court.

How far it goes to prove the issue in fact must go to the Jury, after the its relevancy has been admitted.

It is a fundamental maxim of Jurisprudence that courts should decide the law, & Juries the fact. It frequently happens that the questions of law and fact are necessarily blended and involved in each other. In no species of proceedings is the distinction between these questions so nicely drawn pertained as in demurrers to evidence.

It follows that it is never proper to demurrer to evidence properly introduced, however weak it may be.

But a question has arisen what is relevancy? & upon any given evidence is

Remarks.

× ~~Evidence a deed is exhibited as evidence of a title — a covenant or evidence of a debt —~~

Co. Lit. 72.
2 H. Blk. 205.
6. 4 Bac. 136
2 Jon. 146.

5 Co. 104
Co. Ely 757. 2.
Co. Lit. 72.
3 Plow. 372.
1 Root. 570.
A. N. P. 519.
4 Bac. 136
Co. L. 72

1 Lev. 37.
5 Co. 104.
Co. Ely 757.
4 Bac. 136.
Co. L. 72.

always relevant to the issue which it conduces in any the least degree to prove.

If the question of law arising upon the Demurrer is decided against the party he may put the whole upon record & have a writ of Error.

This Demurrer puts an end to the question of fact and goes to the court with the question of law.

A Demurrer to the evidence like all others admits the facts which are contained in the evidence of the adverse party but denies that these facts have any legal operation in favor of the party adducing them.

When all the evidence adduced in support of an issue ~~is~~ is written it may be demurred to without difficulty and the party adducing it must join in the demurrer or waive his evidence. For the admissibility of this is matter of law and there is no difficulty in putting it on the record as it really and truly is.

Thus if the Pltf. in Ejectment exhibits a deed as the evidence of his title it may be demurred to. Or if in debt he should adduce a covenant under seal this may be demurred to.

Demurring to evidence requires such dexterous management and skill that it is seldom practiced: the common method of objecting is by parol in open Court.

Whether a party exhibiting parol proof which is demurred to is obliged to join in the demurrer is very doubtful from the old authorities. In Co. Ely it was determined that he was not bound by compulsion to join because the evidence in such cases is uncertain. & indeed it may always be pretended that the evidence is not truly stated

Remarks.

Cro. Eliz. 782.

Allen. 18. 19
2 H. Bla. 206.

2 Hen. Bla.
206.

5 Co. 114
2 Hen. Bla.
207. B. & P.
313.

Doug. 114.
Ry. Allen.
1 B. & M. P.
313. Stokes 27
Jac. 22. 34.
2 H. Bl. 207.
207.

Pleas and Pleadings.

This reason certainly will prove inoperative in many cases of parol evidence as this may be as certain as any other species of evidence.

It however has been clearly settled, that if both parties agreed to join in the demurrer the Court must permit them.

It is also settled that if one party adduces witnesses to prove a disputed fact, the opposite party may compell him to join in a demurrer to the evidence to prove the fact or waive the evidence so adduced by admitting the fact on the record. And it is now settled that if the parol evidence adduced in support of the issue is certain in true and explicit, the adverse party by confessing this on the record may compell the party adducing it to join in the demurrer to it or to waive it.

But where the parol evidence is not absolutely certain, but "loose and indeterminate" as "I believe it is so". "It may be otherwise but I should think not" &c. In such cases the adverse party cannot demur to the evidence without admitting the facts to be absolutely true.

For the evidence is such that the jury may might believe it as well as if it was clear and explicit.

This admission of the facts whenever so necessarily necessary must be expressly stated in the demurrer. But when written evidence is demurred to it is admitted without any express admission.

If the evidence ~~admitted~~ adduced is circumstantial the party demurring must distinctly admit every fact upon the record and every conclusion it conduces to prove that is every particular fact which the jury might infer from the evidence — news of parol —

Remarks.

2 Wils. 304.
B. N. P. 246.
4 Bur. 137.

Bull. 302

x but the adverse party may take advantage of such defects by motion in arrest of judgment or after verdict — 2 Saunders 5.

Doug. 208-13
B. N. P. 313.

Pleas and Pleadings

But the relevancy only of this evidence and not the weight of it, is put in issue by the demurrer. But as this must generally must be relevant in some remote degree it is very rarely demurred to. If however it is, there ought to be an express admission of the facts stated or the court cannot render judgment and there must be a venire de novo awarded.

When a venire de novo is awarded however, it is not of course allowed the parties to plead over again, this is an after consideration for the court to allow, for sufficient cause, and when leave is asked.

In Con. Ab. 1787 the S. Court decided that a demurrer to evidence before a single magistrate could not compell the party adducing the evidence to join in any case. This decision seems to be founded on principles of policy (with which however courts of law rarely meddle) and from the consideration that all proceedings before single magistrates wd were entangled and embarrassed by their demurrers.

In 1795 the superior court decided that the party adducing the evidence was not compellable to join in the demurrer tho' the evidence was principally written and all agreed to!!! This is a monstrous departure from all English proceedings principles and seems to an end to demurrers to evidence in this state.

The point put in issue by a demurrer to the evidence is whether the evidence demurred to is sufficient in law to maintain the issue in fact hence no exception can be taken to the pleadings on this demurrer for they are not in issue.

Remarks.

B. R. P. 813.
Doug. 208.
Eff. 203. or
2 12.

Allen 18.
24 Pla. 204.
205, B. R. P. 814.
4 Bac. 186.
2 Tol. R. 117.

B. R. P. 814.
Ld. Ry. 60.
Selk. 834.
Doug. 212.
2 H. Bl. 200.

Pleas and Pleadings.

A judgment upon this demurrer stands in lieu of a verdict if the party would afterwards except to the pleadings. And a judgment cures all defects which a verdict would cure (v) tho' Mr Gould is of opinion that the party stands rather on the same ground that he would after special verdict.

(v) Quere. Because the verdict in many cases cures defect solely on the ground of presuming the jury to have been satisfied of the fact omitted before they would find a verdict. But in this case there is no room for such a presumption, as all the facts put in issue are reduced to writing and there can be no facts put on the record which do not appear in the declaration. How then can the judgment cure such defects since it relates strictly and solely to the record?

In Com. Mr Gould apprehends that under this demurrer to the evidence advantage might be taken in any defect in the pleadings precisely as when an issue in fact is taken to the court. In such cases the court renders judgment at once upon finding the issue in fact so that the party cannot move in arrest.

The party adducing the evidence is in no case bound to join in this demurrer of course, but may always pray judgment of the court whether he shall join in it. Thus it differs from demurrer to the pleadings. And if there is no colorable cause for demurring the court will not allow a demurrer but inform the party that he need not ~~demur~~ join in the demurrer.

On a demurrer to the evidence the jury in Eng are dismissed at once and a jury of inquiry is called to assess the damages if necessary

Remarks.

(o) The mode of demurring to evidence is — The party demurring states it upon the record and alledges that it is "insuf=
=ficient in law to maintain the issue" and concludes praying judgment "that for want of sufficient matter in that behalf shewn in evidence the jury may be discharged from giving any verdict" &c and if taken by Deft. "that the plaintiff may be barred" Bul. N.P. 314. 2 H.Bl. 204. or 200 — — — — —

1 Rod. 570.
2 Swift. 258.

Salk. 284.
B.N.P. 314.

Cro. E. 249.
or 341.
1 Jur. 381.
4 Bac. 136.

1 Bac. 326.
9 Co. 1st.

2 H. Bla.
200. B.N.P.
314—

Pleas and Pleadings.

But sometimes the jury assess the damages provisionally so that if the demurrer is found for the Pltf. he may take judgment for these damages — And if found for the Deft. no notice is taken of them.

But in Con. the jury never assess the damages provisionally for in all demurrers the court assesses the damages, since we have no jury of inquiry.

Any ~~interlocutory judgment of the court~~ interlocutory judgment of the court in admitting testimony improperly &c is no ground of Demurrer to the evidence — for this would be virtually demurring to the judgment of the court and not to the evidence itself — And if if it were not, yet would it really refer the same question to the court for a second decision — The proper remedy in this case is by a bill of Exceptions —

If the party taking the demurrer is overruled upon it he may file a bill of Exceptions, since this is an interlocutory judgment upon a point of law —

The mode of demurring to the evidence is the same here as in Great Britain — For a good form of conclusion see 2 Bur. Blac. 200. Thus far of Demurrers upon evidence (c) — — — — — — — — — — — — —

N.B. Depositions are considered as written evidence when they are spoken of as the proper subjects of a Gen. Demurrer —

Remarks

(o) Seems in N. York When the cause is tried at the circuit motion must be made within 4 first days of subsequent terms — Notice necessary in the Sup. Court —

2 Burr. 900. Doug. 208. 2 W. 3 Bla. 846. — 899. Wyche 178.

Ex. Slander for the words "he is a bankrupt" verdict found the words "he will be a bankrupt"

3 Bla. 392 Ld. Ry. 232. 4 Burr. 2287.

3 Bla. 392

3 Bla. 392

Cro. Eliz. 778. 3 Bla. 395.

Pleas and Pleadings.

Motions in Arrest.

To arrest the judgment is to stop or stay it on a motion made, reduced to writing and entered on the records (c)

A motion in arrest is usually after an issue in fact and after verdict is found, tho' not always. For such motions frequently follow demurrer & demurrer to the evidence. overruled — 2 Bla. 386. 93. Doug. 208. 10. —

In Eng. the judgment is arrested for intrinsic causes only that is for such as appear on the face of the record — As if the suit should vary altogether from the declaration — the one sounding in debt and the other in trespass on the case in such cases judgment will be arrested or the court cannot proceed to render it upon the record thus diverse —

So where the verdict found, differs materially from the issue, judgment cannot be regularly rendered on either side. It would be otherwise however if the jury should expressly negate the issue between the parties and proceed to find more than was laid. then the court might render the judgment upon what of the issue ~~was~~ is found.

So if the declaration is wholly insufficient by ~~that~~ which is meant if it discloses no cause of action, the verdict can be no ground for a judgment, and a motion in arrest may be made or the court may ex officio take notice of the defect, tho' the last is by no means usual

As on one hand the Pltf. cannot have judgment if the declaration is insufficient, altho' he has a verdict — so on the other hand

Remarks.

5 Com. 174.
2 Roll. 916.
30. Salk. 74.

Doug. 658,
5 Bac. 319.
319. Salk.
365. Blow.
202. B.&P.
320. & 321.
5 Bu. 317.
Stra. 1028.
Camp. 825.
2 H. Bl. 901.
Co. L. 479.
4 T.R. 472,
3 Pd. C. 394.
3 Bac. 1724.
7 T.R. 518.

Pleas and Pleadings.

if the Deft's plea discloses no legal defence to the action he cannot have judgment tho' he likewise obtains a verdict. As if to an action sounding in debt, the Deft. should plead "not guilty" and a verdict should be found still he cannot have judgment.

It is a rule which holds universally true that after verdict the judgment may be arrested for any cause which after verdict and judgment, might be assigned for error. For any such defect is sufficient to prevent a judgment.

There are several important distinctions to be taken and illustrated respecting what defects are and what are not aided by verdict. If these are once thoroughly understood the subject becomes at once simple and easy.

1st It is a general and leading rule. If the statement of the Pltffs. title or cause of action and that only is defective this is aided by verdict altho' it would be ill on general demurrer. On the other Hand. If no title or cause of action ~~of action~~ or a defective one ~~stated~~ on the face of it is stated, this defect is not cured by verdict. Or in other words. A defective statement is aided by verdict, but a defective cause of ~~cause of~~ action cannot be cured by verdict. For instance if one sues in trespass and omits the hactenus day this is ill on General Demurrer but is cured by verdict.(a) But if one should sue another in slander for calling him "a Jew" this would be a defective cause of action and incurable. Carth. 398. 17. R. 545. 1 Mod. 292.

Remarks.

(oo) 24. Feoffment pleaded without averring livery of seisin this cured by verdict — Semble if he plead "not guilty" to debt — for here there is nothing denied or avoided which Pltff. has alledged —

particular cases { 1 T.R. 145. Co. Ely 778. 3 Pla. 395.

Cro. Car. 497. Carth 384. 1 Mod. 292. 3 Burr. 1478. 1 T.R. 545. 4 T.R. 472. 7 T.R. 518. 2 H. Pla. 201.

Pleas and Pleadings.

(a) It may be asked why it is necessary to state a day certain in trespass, as the Pltff. may prove any day before the date of the writ & Answer - It is necessary for the Pltff. to state all that is requisite to his recovery - And for this it is necessary that the trespass be committed before the date of the writ or the court have no right to enquire into it on this action, in order that the Deft. may traverse it if he chooses -

The same restrictions apply to the Deft. mutatis mutandis. For if the statement (oo) of the deft's defence and this only is ill, the verdict cures the defect. But if the defence itself or what he pleads as such, is legally no defence or a defective one, the verdict will not cure the defect.

As if the Deft. in trespass or ~~reign~~ Assize pleads a title in himself by giving color to the Pltff. and says that the Pltff. "infeoffed him of the land" but makes no allegation of "livery of seizen" which is a material allegation in pleading a feoffment - this would be ill on a general demurrer, but is cured by verdict for the defect is only in the statement - But if to an action of debt the Deft. should plead "not guilty" and obtains a verdict accordingly this defect is not cured by the verdict.

This distinction was taken as above by Lord Mansfield of "Rushton & Aspinall" in Douglas and supported by the whole current of authorities - see the margin -

In all these cases it is supposed in the terms of the rules that the verdict is in his favor on whose side the defect is found

2dly Any defect in the pleadings which would support a motion

Remarks.

Doug. 658.
1 Ph. 545.
B. & P. 321.
3 Pl. 393. 4
2 Wils. 10.
Carth. 349
Cro. J. 414.

Pleas and Pleadings.

in arrest of Judgment must be such as would have been fatal on a General Demurrer.

The defect must have been ill on a General Demurrer if any, for a motion in arrest cannot be supported by any formal defects, for the party by pleading over waives all formal defects.

This rule however is not true a converso Viz that any defect which would be fatal on a General Demurrer is fatal after a verdict in all cases.

For it is a rule that if the Declaration or plea omits some particular circumstance without which the party obtaining the verdict ought not to have obtained it; but which circumstance thus omitted is implied from the facts which are proved this is aided by verdict. Yet the same omission may be ill have been ill on General demurrer. (C)

(As if the Deft. in trespass or Ejectment ut supra, pleads a feoffment and yet does not aver livery of seizin; this would be ill on a general demurrer. Yet it is good after verdict. By applying it to the above rule we find "livery of seizin" to be the particular circumstance omitted without which the Deft. ought not to obtain the verdict. Yet as the jury have found a good feoffment this is necessarily implied from the fact stated. For livery of seizin is an essential mode a necessary incident of a feoffment. And the court therefore ought to presume ~~nothing to have~~ that the jury found this before they found a good feoffment.

(C) By some the rule is thus laid down. That if the declaration or plea omits some particular circumstance without which the party obtaining the verdict ought not to have obtained it, but which

Remarks

but which circumstance thus omitted may be regularly proved in proving those facts which are stated; this is aided by verdict. As if in ~~Ind~~ at common law to have alleged that a written promise was in writing, and one had declared upon a promise without making this allegation still a verdict would cure it, as he might regularly prove that the promise was in writing in proving that there was a promise which is stated — yet Quere — Yet Mr Gould since it appears to be a clear departure from the principle as laid down in the books and since the record will never furnish any presumptive evidence after verdict that a necessary part was ~~furnished~~ proved merely because it might be proved. On which presumption are all defects cured if on any — In the 2 Root 273 we find what amounts to the following rule on this subject — The verdict only cures such defects as arise from the omission of a material allegation which must be proved by the evidence adduced altho' not stated in order to support the declaration as it stands with the material allegation omitted — As if in Act. notice is not alledged when necessary — Verdict cannot cure the omission because the Act may be proved without proving the notice This last rule corresponds precisely with Mr Gould's —)

Justice Buller says that the court is to presume nothing to have been proved to the jury but what is expressly stated or what is necessarily implied from what is stated —

The true principle on which this distinction rests is, that the court after verdict, will presume that all the facts not alledged which are necessarily implied

Remarks

(a) In this case the verdict aids the defect by supplying on the record, the very fact omitted –

Doug. 654. 17. R. 145
Bul. N. P. 320.
1 Saund 22 Note
Coup. 827. Stra. 1023.
2 Show. 234. 245.
1 Wils. 255. 3 Bl. 394.
Carth. 180. 359.
Salk. 180. 662.
4 Burr. 2018.
3 John. 42. per Spencer
5 Mod. 287.
5 Bac. 317.
7 T. R. 518.
Stra. 212.
1 Mod. 292. 169.
1 T. Rep. 545.
Hardw. 118 –

Carth. 359.
Salk. 180.
Salk. 662.
5 Mod. 287.
5 Bac. 317.
Ld. Ry. 810.
Stra. 212.
1 Mod. 292.

Pleas and Pleadings.

from those which are alledged and found ~~(this not alledged)~~ were proved at the trial to the satisfaction of the jury. Or in other words the court after verdict will in support of it presume ~~that~~ every thing which is a point of fact is necessary to warrant the finding ~~every thing~~ which it was necessary to prove for the purpose of proving the issue. Unless they go upon this principle they will virtually impeach the finding of the Jury which as Lord Coke says "imports absolute verity" and which is a species of record that can not be impeached or contradicted.

Thus if in an action of trespass no day is laid certain in the declaration, here the court must presume after verdict that the trespass was proved at the trial to have been committed before the ~~Court for~~ Writ ~~after verdict~~ for this is necessary in point of fact in order to find the Deft. guilty before the day of the date of the writ. And it is necessarily presumed to have been proved in order to justify the finding of the jury, which in all cases the court will do. But if in Covt. the Deft. omits to state the performance of a condition precedent after verdict this cannot be presumed to have been proved and this therefore cannot be cured by verdict. So if a feoffment is pleaded without averring "livery of seizin" the court after verdict will presume that this proved at the trial if the jury find the feoffment because it is an essential and necessary part of the feoffment in point of fact. (a)

For the true and only mode of the Verdict curing defects is by virtually supplying a new fact, or in other words by putting on the record by necessary implication the circumstance omitted in the Declaration or plea.

Remarks

1 Ld. 145.
10 Mod. 301.
5 Bac. 317.
Hut. 54.

Hut. 54.

3 Bla. 394.
1 Mod. 298.

3 Burr. 1788.
1 Bac. 101.
2 Ld. Ry. 810.
2 Str. Hut.
1 T. R. 508.
1 T. R. 145.
Hut. 17
3 Bla. 394.
Doug. 658.

1 John. 276.

Pleas and Pleadings.

It is sufficient that the fact is put upon the record by implication agreeably to the established rule of pleading, that what already sufficiently appears need not be averred. This is the true principle on which verdicts are said to cure defects. Viz by supplying the fact omitted. And the greater part of the books may be attributed to an ignorance of this principle.

Thus if a grant of an advowson is pleaded but without any averment that it was by deed and the jury find the grant. The fact then of its being by deed is supplied by their verdict, for there cannot be a grant without a deed.

The great principle is this. The verdict ascertains those facts which from the inaccuracy of the pleadings did not before appear. And these facts it supplies to the record. Thus far of what defects a verdict cures.

On the other hand. nothing after verdict can be presumed to have been proved except those facts which are alledged and those necessarily implied from them. So nothing will be presumed which in point of fact was not necessary to warrant the finding. or in other words stat. Nothing will be presumed to have been proved which it was not necessary to prove in proving the facts found. This rule in all its various modifications is nothing more than was laid down by Lord Mansfield in saying that a defective title cannot be cured by verdict.

Thus if the declaration is totally devoid of substance the verdict cannot cure it because it cannot supply all the defects. The truth is

Remarks.

5 Burr. 1728.
Doug. 658.

~~46~~ 4 Bac.
16. 4 Co. 10.
5 Com. 45.
2 Burr. 900.
145 - 4 T.R. 472.
4 T.R. 125.
8 ~~Ve~~ 127. K.
2 H. Bla. 594.
2 Root 273.
275.
1 T.R. 645
4 T.R. 472.
Bth. P. 321.

Salk. 66.
9 ~~H~~ Salk.
12.
Doug. 658

Doug. 654.
2 Root 243.

the same with a plea in bar. As if one sues in slander for calling the Plaft. "a Jew" - Since there is no cause of action here, it is impossible that the Plfts. cause can be made good even altho' the pleadings are perfectly accurate and no presumption is necessary - And besides there is no possible room for a presumption which can supply the defects so as to support the action.

But further - If any fact is omitted which is essential to the right of action or to the ground of defence and which fact is not inferable from those which are stated and proved, this fact so omitted cannot be presumed to have been proved and is not therefore supplied by the verdict.

As if in an action of covenant broken the Plft. should omit to state the performance of a condition precedent when necessary. And yet should obtain a verdict the judgment would be arrested because it was not necessary to be proved to warrant that finding by the jury.

So also if A. sues B. for damage sustained from his mischievous dog and omits to allege the "Scienter" or over his knowledge - Judgment shall be arrested, because the Jury might find the mischief without the knowledge being proved. Since it is not necessary to find the knowledge in finding the facts stated. 1 Johns. 468. 3 Mod. 261.

So the same reason if Asst. is brought by the holder against the indorser of a bill of Exchange, without stating a demand upon the acceptor or alleging notice to the indorser of the acceptor's refusal, this defect is not cured by a verdict - Since it is not necessary to prove the demand in

Remarks.

(a) In this instance it is clear that the fact omitted was not inferable from the facts alledged and proved, and was necessary to be proved to the Jury to warrant them in finding the facts ~~stated~~ which are stated — Young, 6 ~~Pet~~ 4.

Ruby 403
1 Vesey 27.
7 Term 237.

proving the Aptt., nor does the Verdict supply the omission.

Indeed Mr. Gould thinks it may be safely laid down as a rule altho' it is not expressly authorized in the books that the court cannot presume any fact omitted, to have been proved at the trial which is necessary in point of law merely to prove the issue or to warrant the verdict.

For if the court could presume such facts to have been proved they surely ought in the case adduced above, have presumed that notice was given the indorsee for this is necessary in point of law to warrant a finding which will subject him.

Indeed if this is to be presumed it must be on the ground that Jurors are competent judges of the law as well as of fact and of course every possible defect which could stain the record is cured by verdict. And it could not be proper to call any part of the pleadings in question after verdict indeed i.e. as to their sufficiency &c.

Or if in Asst. the Pltff. should state no consideration for the promise and on non Aptt. pleaded should obtain a verdict, it is a perfectly clear principle of the law recognized in all the books that this defect is not aided by verdict, because the essence of a contract in the eye of the law is a consideration and because the ~~consideration could be~~ promise could be proved without proving the consideration. Yet if the court are to presume that because the jury could not have found a promise in point of law, without finding a consideration, they therefore had a consideration proved to their satisfaction; if the court are to presume.

Remarks.

(a) If the judgment has been entered on demurrer it is said that there can be no motion in arrest for any exception that might have been taken in arguing the demurrer – Secus in case of Judgment by Default Tidd – 819.

2 Burr 900.

Hob. 56. 199.
8 Co. 120.
8 Co. 133.
Sd. Ry. 1082.

Sd. Ry. 1080.
8 Co. 120.

Ideas and Readings.

this, then is such a defect and all others whatever aided by Verdict. How absurd and ridiculous! And yet in this very case it has been decided in Court = ject that the verdict cures the defect!! Tho' the precise case has been determined otherwise repeatedly in Great Britain.

Thus of defects cured and not cured by verdict. It requires only strict attention to be clearly understood.

3rd A motion in arrest of judgment may be regularly made without any verdict as in cases of default. The parties may argue in this manner respecting the facts. But if they should argue as to points of law which were incorrect their argument could have no influence with the court as they would not regard it.

This motion in such cases operates precisely as a demurrer to the declaration or plea. For nothing can (be cured since nothing can) in fur = nished when no facts have been found. The facts are necessarily admitted as they are stated. (o)

In some cases however judgment will not be arrested for the gravest defects even where the verdict does not cure. The rule is this. If the verdict is in favor of that party which on the whole record appears entitled to judgment he shall have judgment, he shall have judgment however faulty the pleadings may be on his part.

The preceding rule is established on this principle, that in a question of law the sufficiency of the pleadings comes in question. If therefore on the whole of the Defts pleadings taken together, there is sufficient to

Remarks.

Hob. 56.

Hob. 56. 199.
8 Co. 120. 183.
2 Ld. Ray. 1080.
9 Co. 140.
3 Lev. 244.
4 Bur. 131.
8 Rep. 120

8 Co. 120.
Ld Ray. 1080.
9 Co. 130.
Hob. 56. 199.

1 Burr. 301.

shew his right, he shall have judgment, if the verdict is in his favor without any arrest.

Thus suppose the declaration is insufficient and the plea in bar frivolous, and the issue immaterial, if a verdict is found is found for the Deft. the first defect prevents his side the Pltff. cannot have the judgment arrested, for upon the whole record the Deft. is entitled to a recovery, and because it would be nugatory — since if it should be arrested, still the Pltff. could never recover against the Deft. upon such a declaration —

Again — Suppose the Declaration to be good, the plea in bar & the replication frivolous and issue to be taken on the replication and found for the Pltff. — The Deft. cannot arrest the Judgment, for he has left a good declaration wholly unanswered and he never could succeed with such a plea, for which the replication altho' bad, is good enough —

On the other hand there are cases where the ~~verdict~~ Judgment is arrested after verdict and rendered against the party for whom the verdict was found —

Agreeably to this rule — If the party against whom the verdict is found, appears upon the whole record entitled to the Judgment, it shall be rendered in his favor the verdict notwithstanding.

For instance suppose the Declaration insufficient, and the plea in bar good or bad (no matter which) and issue taken and found for the Pltff., yet the Deft. may move in arrest and have judgment entered for himself —

Remarks.

ut supra.
1 Burr 201. &c

Co Ch. 133.
3 Lev. 82.
Ld. Ray. 1321.
Stud. 3414.
Stran. 1089.

1 Vent. 24.
Co. Lit. 247.
12 Mod. 5.

3 Bac. 299.

2 Roll. 717.
Co. J. 407.
6 Co. 54.

Pleas and Pleadings.

Or if the Declaration is good and the plea in law frivolous & the replication pleaded good or bad, and issue taken on it with verdict for the Deft. the Judgment will be arrested and rendered in favor of the Pltf. notwithstanding, for the Pltf's good declaration remains unanswered, and the ~~Pltf's plea~~ Deft's cannot be made good by verdict or any thing else.

4th. Judgment will sometimes be arrested for defects in the verdict when one is found. As if the Jury should find only a part of what is material in the issue. in this case no judgment could be rendered but a venire de novo must be awarded, for the jury are bound in all cases to find the whole of what is in issue in one way or other i.e. they must dispose of the whole as they think proper and just. But if the substance of the whole issue is found in the verdict, the court will not regard form, but render judgment as tho' all had been found in the usual form.

5th. So if the verdict varies from the issue in substance judgment must be arrested — As if the Jury should find something altogether foreign from the issue.

By this however is not meant that the Jury cannot under the general issue find a special verdict for this is unquestionably regular. But the special verdict in such a case is rather a history of the evidence adduced than any opinion which the Jury have concluded to leave to the court.

But a verdict which finds the issue is not vitiated by finding more than the issue since this will be mere surplusage — Brief

Remarks.

10 Co. 130.
Doug. 362.
Stra. 1094.
1 Bost. Pull.
329. 2 Ch. Pl.
31 G. Eq. Ca.
32 G. 7 Ch.

Stra. 513.
523. 1 Lev.
134. Doug.
362.

Pleas and Pleadings.

in an action against an administrator the question should arise "Whether he had assets" And the jury should find that "he had assets beyond sea" still the verdict would be good and the words "beyond sea" must be rejected as surplusage.

If in a civil cause there are two counts in the declaration, one good and the other ill and the jury should find a general verdict with entire damages, judgment will be arrested; because the court know on which of the counts the jury assessed the damages.

As if in an action of slander there should be two counts in the declaration, one charging the Deft. for calling the Pltf. "a thief" and the other for calling him "a Jew" and the jury should the Deft. guilty and order him to pay $100 damages judgment in such case must always be arrested.

But if several damages are assessed upon the several counts, the Pltf. may release those wrongly assessed and take judgment for the remainder. But why is there a necessity for a release? as the court in the judgment might sever the good from the bad counts and order for the first only.

But altho' entire damages are given yet if there was no evidence offered to the jury in support of the bad counts the verdict may be amended by the court from the notes of the judges, so as to apply to the good counts only.

But this is never amended if any the least degree of evidence

Remarks.

1 Root 346.
1 Dr. 493.

Doug. 362.
2 Str. 564.

2 Burr. 985.
2 Bla. 627.
Selk. 334.
Doug 780.

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was adduced in support of a bad count.

But in Connecticut the rule is this. If the Declaration lays two distinct causes of action, one good and the other bad and if the jury find entire damages Judgment will be arrested.

Yet the rule is otherwise where there is only one real cause of action stated in both counts and the last is surplusage, which is not intended as a distinct cause of action from the first.

As if in slander the Pltff. ~~the Pltff~~ should declare against the Deft. for calling him at one time "a liar" & ~~Verdict should be found for the Pltff. generally~~ at an other time "a thief" and verdict should be given for the Pltff. generally, the Judgment would be arrested. But if he should declare against the Deft. for calling him on a certain day "a thief and a liar" The last part would be considered as mere matter of aggravation and would be ~~no~~ rejected as surplusage.

By these two distinct causes of action however is not meant a misjoinder, as they may be supposed to be of the same nature.

When Judgment is arrested in these cases, the judgment is a venire de novo And in Eng. a new jury is summoned immediately to try it. But in Connecticut it usually lies over until an other court. It may be observed that in all such cases the issue is right and the verdict alone wrong.

These distinctions are none of them applicable to criminal cases for in such cases the jury merely find the guilt and do not assess the damages. Hence there is no reason for the distinctions obtaining as the court will render judgment on the good counts ~~only~~ alone.

Remarks

Riley B. 139
184 Sta. 042.
1 Unit. 125.

Riley 184.

Riley 184

Riley 184.

Riley B.
139 / 184.

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Of Motions in Arrest in Connecticut.

In Con. the Judgment is arrested after verdict for many extrinsic causes. Such as any corruption or misconduct of the Jury or any tampering with them and according to our practice, these special facts are stated on the record as any plea in bar.

Thus if the Jury should find their verdict by the cast of a die or if one of the jury should conduct improperly either with other persons or one of his fellows the judgment would be arrested.

In Eng. Judgments are arrested only for intrinsic causes, generally speaking.

So in Con. if one of the Jurors is interested in the cause or related to either of the parties, so near as to found a principle challenge Judgment will be arrested.

Indeed it is said that if one of the jurors is related in this manner to the person who gives special bail for the successful party, that the judgment will be arrested as tho' he was related to the principal.

So also if one of the Jurors has been an attorney to the successful party or has given a previous opinion upon the cause, the judgment will be arrested on the ground that there has not been an impartial trial.

It is a general rule in Con. that the competency of a juror, if it goes to his impartiality and is a good ground for a principal challenge is a good cause for arrest of Judgment. A principle challenge is one founded on any cause which carries with it any prima facie evidence of partiality. As a near relationship of one of the Jurors to one of the parties &c.

Remarks.

Stat. Con. 249.
Riley 184.

2 Swift 282.
Riley 166.

Riley 166.
2 Swift.
282.

Riley 486.

Riley 62.

Pleas and Pleadings.

A challenge to the favor — is one founded on any cause which ~~carries with it~~ does not carry ~~with it~~ prima facie evidence or marks of partiality with it. As a friendship or good neighborhood between one of the Jurors and one of the parties in the suit &c —

But any incompetency which raises no presumption of partiality is not a good cause for an arrest of Judgment. As if a Juror should give a verdict without being a freeholder as our statute directs — Judgment will not be arrested at this stage of the pleadings, for this incompetency can raise no presumption of partiality —

Altho' the incompetency does go to his impartiality yet if the party against whom the verdict is found, knew the fact in time to make a principle challenge, he is presumed to have waived it —

So also if one of the Jurors has before tried the same cause in the courts below, tho' this is a good cause for a challenge, yet it is not a good one for moving in arrest — For this fact appears on the record in time to make the challenge and both parties are presumed to know it when they go to trial —

A previous opinion delivered by one of the Jurors is an other good ground of Arrest — But such an opinion upon a general principle of law which is involved in the issue of the cause upon trial — is neither a good cause of arrest nor of a challenge —

And it has been decided in Con. that a previous opinion upon the very cause tried is no cause of arrest — if it appears clearly that

Remarks.

Bailey 61.87.
142/273.277.
2 Swift. 264.

2 Swift —
2 64 h. 1 Root
573.

5 Bac. 288.
291. 6 Lev.
2 Ins. 3 Sta.
642 —

such an opinion of the juror did not influence the verdict.

Thus where one of the jurors gave an opinion in favor of the prevailing party several years before the trial; yet upon being interrogated declared that he had absolutely forgotten it. And where it further appeared that he was the last to give his opinion even after all the rest had agreed upon the a verdict— It was decided this was not a good and sufficient ground of arrest—

But altho' the Court in Con. will enquire whether the suitors had an impartial trial upon this motion, yet it will never enquire into the evidence on which the verdict was found—So it will never be competent for a party to move in arrest of Judgment on the ground that the jury found a verdict contrary to evidence.

It is said by Judge Swift that on an arrest of Judgment for any extrinsic cause a replead is awarded— This is not correct— For by such a motion there is no mistake in the issue supposed, which is the only ground of a replead— There is a rearguement after the Judgment in arrest which must be what Judge Swift intended— And there must be a mistake in the word—

In Eng. the Judgment is often arrested for the same extrinsic causes as in Con. but in a very different manner.

The Verdict there as well as here is set aside for all those causes which go to shew that the party had not a fair and impartial trial—

The usual mode however in Eng. of setting aside a verdict for these is by an application for a new trial. This is frequently the mode—

Remarks.

Indeed our practice has been twice adopted in West. Hall and the court of Bergr Bench have set aside verdicts on affidavits of misconduct in the jury, But this it seems is not the regular mode in G.B. 5 Bac. 294. 1 Freeman 79.

Salk. 579.
2 Vent. 196.
1 Term. 267
1 Root 69.
70. 572.
Riley 89.

Berger v. Collier & C.

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adopted in Con.

The manner of doing it is this – When the facts appear to the Judge at Nisi prius upon his interrogatories, he enters them on the postea, so that they then become intrinsic causes. But in Con. we bring these facts before the court as we do those in a special plea. And accordingly our causes are as much intrinsic as theirs in Great Britain. (a)

Of Awarding Costs &c. – On a motion in arrest no costs are regularly allowed on either side – For the party prevailing on this motion ought to have no costs, for he might have demurred to the defects usually, where the causes are intrinsic and he shall be punished for delaying until this late time in the pleadings – This is the rule in G.B. and in Connecticut.

So also on a writ of Error after verdict no costs are allowed – As if the Declaration should be insufficient – the Deft. may demur, but instead of this he pleads to the issue, and the Pltf. obtains a verdict. In this case on a motion in arrest or on a writ of error after the Judgment has followed the verdict he shall recover no costs and in the last case he shall be excluded not only from his costs as Pltf. in error but also from all costs incurred in the court below, since he neglected to demur and protracted the case to such an unreasonable length –

But the rule in Con. is otherwise on arrests for extrinsic causes since the party cannot demur in such cases and therefore the reason does not operate – The party prevailing at the second trial (no matter how the previous rules have been) shall have all the costs incurred during

Remarks.

2 Swift 264.

3 Bla. 395.

the suit. And if the party obtaining the arrest does not prevail on the second trial, his opponent shall recover his costs for both trials notwithstanding.

But it is a general rule that costs are allowed when the issue joined in fact is closed to the court on motions in arrest or writs of error — since under this issue exceptions may be taken to the pleadings. For the General Issue in this case operates quasi a demurrer.

In issues of fact so closed it is not usual to move in arrest of judgment for the court judges as well of the pleadings as of the evidence and immediately renders judgment upon the whole together. Except in one or two instances where the court on request have reserved the question of law for an after consideration.

The form of a motion of arrest in Lou. is in substance this. "Now the Deft. after verdict found and excepted and before judgment rendered thereon prays the court that the judgment may be stayed and arrested and that no judgment be rendered in pursuance thereof; because he says &c (stating the causes) (that the declaration is wholly insufficient &c) all which he is ready to verify and hereof prays judgment &c.

No issue is closed upon this motion usually, but the court proceed to enquire into the propriety of the motion without any joinder.

In Eng. all motions in arrest must be made in the first four days of the term next succeeding the trial, and after this time no motion can regularly be made.

But in Lou. or all our courts are <u>in bank</u>; motions in arrest are

Remarks.

1 Ruby 235.
1 Root 572.

3 Bla. 395
2 Vent. 96.
3 Stra. 994.
T. Ray. 468
Sd. Ray 707.
1 Bebr. 30.
302. &c.
4 Bc. 126.
6 Wyche
172.

Pleas and Pleadings.

made on the term in which the trial is had and the rule is that such motions must be made when the verdict is accepted it must be reduced to writing and tendered to the adverse party or lodged with the clerk of the court within twenty four hours after the verdict is ~~or~~ accepted. And in all cases before the rising of the court if only one hour intervenes between the time of accepting the verdict and the rising.

Of Repleaders.

In many cases after an arrest of Judgment a Repleader is awarded. By a Repleader is meant pleading anew.

General Rule. If the issue on which the verdict is found is immaterial so that the court cannot know from it, for whom to render judgment, a Repleader is awarded on the judgment being arrested.

The object of a repleader is to enable the parties to go to trial on some material issue which will decide the controversy. The reason of it is that the court may know for whom to render judgment. ~~on the whole face of the record in all cases for the verdict~~ Thus if the Declaration be good, and the plea in bar good, and the Pltff. should traverse an immaterial fact or part of the plea and obtain a verdict. In this case a repleader would be awarded after an arrest of judgment to enable the Pltff. to take such an issue on the plea in bar as to decide the controversy. for the verdict decides nothing.

Mr. Gould cannot ~~see~~ perceive the necessity or propriety of a

Remarks.

* therefore judgment ought to be for Deft.

(o) But the Deft. has verdict judgment on Deft's plea & will be nonsuited & Pltff. has judgment —

Repleader in any case. Neither can Judge know. For according to his speculations upon an issue in law, it is wholly impossible for the court not to know for whom to render judgment on the whole face of the record in all cases — For the Verdict which finds only a part of the facts leaves the other unfound. And the party admits of course what he does not ~~demur~~ traverse — x

Now if the Declaration is good, the plea in bar is good, and the Pltff. traverses an immaterial part of the plea in bar only; he of course admits the material part according to the last rule. Why then should not judgment be rendered at once, or when an issue in fact is put to the court? Besides it is rather singular that if the Deft. should demur to such a traverse of the Pltff. he then should have judgment — Why not give him judgment also after verdict — Since the verdict so found on an immaterial issue does not decide the merits of the controversy in the least — Probably however there are sufficient reasons to authorize Repleaders in such cases, or they would not have so universally been admitted without a question. But these reasons Mr. Gould has not been so fortunate as to fathom as yet, altho' he has devoted much time to their consideration —

Again suppose the Declaration to be good and the plea in bar wholly insufficient, suppose further that the Pltff. in his replication takes issue upon the plea in bar and obtains a verdict (o) — Here no repleader will be awarded, neither will the Judgment be arrested for it appears upon the ~~whole~~ face of the ~~record~~ whole record that the Pltff. is entitled to a recovery, since nothing could make a material issue on this

Remarks.

(o) no manner of joining could have aided the Deft. and a replevin is never awarded for a defect which cannot be cured — so says the rule which follows —

Stra. 394.
4 Burr. 2130.
1 Burr. 301.
5 Com. 136.
8 Co. 120.
8 do 133.
Hob. 56. 199.
200. —

(oo) Ly. and if Plea in bar sufficient Pltf. traverse an immaterial fact and bar a verdict, on a replevin awarded the Pltf. is to take a new traverse or make a special replication

4 Bac. 7. 131.
361. Jenk. 162.
11 Co. 10.
5 Bac. 286.
Salk. 179.
Ld. Ray. 984.
Dy. 362.

3 Ble. 395.
Sab. 173. 216
575. Ray. 458.
3 Keb. 664.
1 Mod. 2.
4 Bac. 121. a 6
Comp. 510 —

plea in bar. It would therefore be nugatory to award this. (o)

It is a rule which holds universally true; that a repleader will never be awarded for a defect which cannot be cured. For in this case a material issue cannot be joined which is the sole object of a repleader & the court cannot know for whom to render judgment from the finding of the jury.

As if A. having executed a bond payable "on or before" a certain day, should plead that he paid it on the day. And the Pltf. should traverse it, go to the jury and obtain a verdict. Here a repleader would be awarded for the Deft. For he may have paid it before the day specified for aught that appears. Or suppose the Deft. plead the stat. of limitations to an action, and the Pltf. should reply "accrevit infra sex annos." & verdict found for the Deft. here a repleader will be awarded for the Pltf. might have shown a subsequent promise on a material issue.

Suppose the Declaration to be good, the plea in bar bad and the replication bad, the Pltf is entitled to judgment in such a case altho' the Verdict goes for the Deft.

Or a repleader awarded, the pleadings begin anew from that stage of them at which the first deviation from the regular course of pleading. As in the last case on a repleader if one should be awarded the Deft. must plead a new plea in bar. (oo)

The Judgment is quod replacitant. merely so that this does not determine where the repleading is to commence. But the parties

Remarks.

Salk. 579.
3 Bla. 395.
T. Ray. 454.
2 Lev.
3 Raym. 654.
1 Mod. 2.

Doug. 340.
1 H. Bla. 644.
11 Rep. 10
Dyer. 362.
Hob. 53. 56

Pleas and Pleadings

learn this from the opinion of the court as they delivered it.

It is laid down in Salkeild, that if the Declaration, plea, and replication are all insufficient and ill all the pleadings must be new. This most clearly is not law because nothing material can ever come from such a declaration, if it is so insufficient as not to make out the Pltffs right of action. The Pltff. therefore can never have judgment and of course no repleader will be awarded.

But it seems that a repleader for the immateriality of an issue is never awarded in favor of that party which tenders the issue. As if the declaration and plea in bar should be good and the replication should be taken to an immaterial part of the ~~issue~~ plea. In this case if the Deft. has a verdict Judgment shall be rendered for him and the Pltff. shall not replead.

For it appears from the whole record that the Deft. is entitled to the Judgment, and a verdict on an immaterial issue will avoid nothing, it is therefore an issue ~~to the court~~ in law to the court.

Yet if in such a case the verdict should be found for the Pltff. altho' the same appears upon the face of the record still the Deft. shall not ~~have~~ have judgment. Query. How can this be reconciled with the rule laid down under motions in arrest that, "if the party against whom the verdict is found appears upon the whole record entitled to the judgment, it shall be rendered in his favor the verdict notwithstanding."

Remarks.

5 Bac. 286.
11 Co. 10.
Dyer 362.
Hob. 53. 96.

4 Bac. 129.
5 Co. 52.
Cro. Ja. 92.
Latch. 148.
6 Mod. 102.
Cruise. 9
Sem. 20. 440

Salk. 579.
6 Mod. 6.

Salk. 579. 215.
6 Mod. 6.
Salk. 219.
Comb. 329.

Pleas and Pleadings.

The rule therefore that a repleader is never awarded in favor of that party who tenders the immaterial issue upon it supra is established as a species of punishment upon the party so pleading. But why should not the other party be punished equally for joining in such an issue, since it is his duty to demur. Mr. Gould sees no reason for these rules.

If the Jury after finding a set of facts specially proceed to make certain conclusions therefrom from those facts — the court will pay no regard to such conclusions, but proceed to draw their own from the facts so specially stated — As if the Jury were to try whether G.B. was seized in fee — and after finding a certain set of facts specially stated proceed to say "that therefore he is seized in fee" This conclusion would have no effect whatever with the court —

A repleader can never be awarded after a demurrer; for an issue in law cannot be immaterial, it is only after an issue in fact that it is awarded — Tho' it was once held otherwise —

If a repleader is awarded when it ought to be denied or denied when it ought to be awarded the Judgment will be erroneous and a writ of error will lie — This has been repeatedly decided in E.B. and it was so held by the supreme court of error in Conn. in the case of Gleason & Cowles vs Chester — T.B. 1803 — 6 Mod. 2. 4 Bac. 126. Salk. 579.

There can be no repleader after a default or discontinuance awarded, since there is no issue found, and by a default the Deft admits the truth of the Declaration, so that there can be no issue —

Remarks.

(o) Judment is sometimes arrested for defects in the verdict – Ex. when Jury find only part of the issue omitting something material – A venire de novo issues – Co. L. 227. Dyer. 421. Stra. 844. 1089. Ld. Ray. 1524. 5 Bac. 296. Co. Elz. 133. 3 Leon. 82. Hard. 166. –

So if in a special verdict the Jury find only the evidence of a material fact and not the fact itself 1 East 111. –

But if the substance of the issue is found that is sufficient – Co. L. 227. 1 Vent. 27. 12 Mod. 8.

If the verdict varies from the issue in substance it is ill & and judgment regularly arrested – Ex. Jury find something foreign to the issue instead of the issue – 5 Bac. 299. 2 Rol. ab. 44. 18. 707. 719. 2 Vent. 151.

But a verdict which finds the issue is not vitiated by finding something more, it is mere surplusage – utile per inutile. Ex. Issue whether the Deft. has assets – verdict beyond sea. Co. L. 227. 5 Bac. 297. 2 Roll. 1717. Co. L. 707. 5 Rep. 57 –

1 Bac. 90.
Id. 106.
3 Bulst. 664.
6 Mod. 8.
Keilw. 291.
Skinner 570.
Salk. 579.
4 Leon. 19.
4 Bac. 56.
126. 7.
1 Bac. 90. 103.
1 Lev. 32.

6 Mod. 101.
2 Lev. 1 – 2.
12.
4 Bac. 129.
2 Saun. 319.

Pleas and Pleadings.

Before the Eng. Stat. of Jeoffails Repleaders were awarded before trial, or before the issue was found - for before those statutes the verdict cured no defects, so that the question before the court was precisely the same as on a Demurrer - But since those statutes it has not been customary to award Repleaders before trial, tho' I see no reason why they may not be so awarded at present, if the declaration is altogether immaterial - Indeed it is so held in Salkeld - yes & you found fault with the decision

A Repleader is never awarded on a writ of Error, for the issue is an issue in law and of course material - And if the cause should be remanded to a court of law, it would certainly be improper to award a repleader before them, as they ought to regulate their own proceedings - If however the writ of error was taken on the denial of a repleader when it ought to have been awarded and the judgment reversed - this judgment on the writ of error virtually awards a repleader from the very nature of the case - (a)

Writs of Error.

Remarks

2 Bac. 187.
3 Blo. 407.
Jenk. 28.
2 Ins. 4.
pilo 209.

2 Bac 315.
1 Com. 286.
5 Com. 286.

Writs of Error.

A writ of error is a commission to Judges of a higher court to examine the record on which Judgment was given in the court below, and to affirm or reverse it according to law.

Writs of Error are of two kinds the first and principal ~~kind~~ kind are taken upon error in law, and are for the purpose of correcting mistakes in point of law which happened in a lower court.

The second kind are writs brot upon error in fact and may as well be brot before the same court as any other. But the consideration of these is reserved for a future occasion.

1st Of Errors in Law. There must appear upon the face of the record - and the writ must be brought to some court superior to the one which rendered judgment.

It is not material how many mistakes the court make there can be no reversal of their judgment unless these appear upon the record.

When therefore a question of law is made and a judgment is rendered thereon as it appears on the record of the inferior court a writ always lies. But whether successfully is a very different question.

No question of fact can be tried on this writ, and no testimony can be adduced. As if the Deft. should demur to the Declaration as insufficient and it should be judged sufficient, here the whole question appears upon the record and a writ of error lies.

So if there is no pleading, but a default and judgment is rendered on an insufficient Declaration, a writ of error lies. This is sometimes

Remarks

1 Roll 714.
0 Bac. 199.
1 Vinc. 255.
0 Rebl. 308.
Selch. 193.
1 Sid. 104.
2d. 466 —

6 Sh. 766.
2 H. Blo. 267.
2 9 9. Carth
~~2 2 4~~. 184.
6 Sum —

Writs of Error.

beneficial, but most usually is a dangerous experiment.

So altho' no writ of Error lies upon an issue in fact, yet if any interlocutory judgment is rendered wrongly during the trial, this writ of Error lies. As if a witness should be offered, and the court should reject him when he was competent yet no writ of error lies for this unless the matter is reduced to the record; Which is done by filing a bill of exceptions stating the facts &c. And then it becomes a part of the record and a writ of error lies.

It is a rule which holds universally true, that if there has been error committed or claimed to be committed, upon rendering judgment upon interlocutory questions as excluding a witness. Or overruling a good plea in abatement, no writ of error can be brot until the conclusion of the suit. For this reason. The party taking the writ may indeed obtain the cause on the merits and therefore will want no writ of error.

It is a general rule subject however to a few exceptions that if the Deft. neglects to plead in abatement matter proper for an abatement altho' this all appear upon the record, still no writ of error lies. The exceptions to the last rule shall be noted hereafter.

The object of a writ of ~~error~~ on Judgment ~~as a writ of error~~ is to restore what is lost. And to be proper it must answer this great end.

Writs of error are usually taken out with a bondsman.

Remarks.

2 Bac. 210.
2 Kebl. 129.
Barus 370.
1 J. R. 280.
4 Bac. 542.
or 672. 3.
1 Bac. 218.

Writs of Error.

The principle of the Eng. law is that if one takes out a writ of Error without a boundsman, this should not serve as a supersedeas and should not stay the proceedings. But as a stat. was made in Eng. that a boundsman was necessary to this writ, Hence now in both countries whenever a boundsman is on this writ it operates as a supersedeas.

The object of the bond is neither to find surety for the costs or for the good behavior of the Plff.; but for the purpose of securing to the prevailing party in the court below all which he can or shall loose by or in consequence of this writ of Error. Or the Plff. in Error might defraud his prevailing adversary, by praying out a writ of Error, staying the process and absconding.

To this bond no defence can be made; on this the boundsman is not only liable for what cost have accrued by his staying the judgment but for the interest on the judgment also.

The form of a writ of error is extremely simple. It merely summons the Deft. to appear before the court "to hear read the whole process & record of the cause in the court below and the errors therein contained; in the words following Viz &c —— It then declares that manifest error has intervened and the error must be assigned (but it may be assigned as general as possible) and the demand is that this suit is brot for the reversal of said erroneous Judgment & the recovery of what he has lost thereby, which sum is not less than —— Dollars &c. &c. And the recovery of damages in the Judgment below

Remarks

4 Bac. 670.
644. 1 Dial.
30. Th. B.
234.
2 H. Bla.
372. 2 Roll
210. 211.
370. 4 Bac.
681. Geo. 6.

with the interest thereon—

There has been some question when this writ of error operates as a supersedeas, and the rule established is this—

When the judgment on which the writ is taken is executed the writ has no effect whatever upon it, but until it is executed this writ operates as a supersedeas—

Now if the property of the party is levied upon and sold before the writ ~~becomes due~~ comes, there is no question but that the writ is inoperative— But suppose the property is levied upon but not sold at the post as the law directs before the writ of error is taken out and served, it then was unquestionably operates as a supersedeas. Since the judgment is not executed within the meaning of the rule until the property is sold, the money collected and applied to the execution—

But where the body is taken on the execution the judgment in all cases may be considered as executed in the eye of the law, as much as if the money was paid— So that this writ does not release the body or operate in any manner as a supersedeas—

The general Issue to a writ of Error is this "Nothing erroneous"

The Eng. courts of error are the common pleas, to which writs of error can be taken in civil but not in criminal jurisdiction— From the com. Pleas writs of error in all cases lie to the court of King's bench— From thence they may be taken to the court ~~of Exchequer it to the~~ Exchequer chamber and finally to the house of Lords— Or they may be taken

Remarks

1 Roll 774.
805. Coil Cu.
442. 509.
512. Gelb.
47. 1 Balk
262. Cutt.
223. 1 Zu.
310–

Writs of Error

from the King's Bench to the house of Lords directly. The King's Bench however is the proper Court of Error for all inferior Courts in civil and criminal cases. And if the case originates in the court of King's Bench the writ of Error is taken to the Parliament.

The court of Exchequer Chamber was constituted merely for a court of Error, since all cases before which were decided moneourly in the King's bench, were necessarily taken to parliament which was not in session frequent enough — And this court was undoubtedly intended originally as the dernier resort, tho' when this question came before the house of lords they determined that this court could not oust them of their jurisdiction —

Altho' the House of Lords is a defective tribunal in itself for the decision of questions of law, yet it has been well managed, as the Judges or a majority of them have always decided the questions before this house invariably for two hundred years without an exception —

The Judges of the Exchequer Chamber are the judges of those lower courts which have not tried the ~~same~~ cause — As if a cause was taken from the King's Bench to the Exchequer Chamber, the Judges of the courts of Com. Pleas & Exchequer together with the Lord Chancellor &c — would decide upon it —

The method adopted by the courts in G.B. to enforce that great principle of restoring to the party what he has lost is this — If the judgment of the lower is affirmed Costs merely are awarded in this court but no execution issues anew, since the old one stands in full force, & in this case is not affected by a writ of error — The judgment of the superior courts

Remarks.

Writs of Error.

in such case according to the old year books is this:- "Quod judicium remanebit statuere in perpetuum" This rule applies equally to our state as to the courts of G. Britain.

When the Judgment is reversed in G.B.- the court above will render the same judgment which the court below ought to have done, if it is con=sistent with the constitution of the court. Thus if the Plff. in the original suit brings error on the ground that his declaration in the lower court was adjudged ~~sufficient~~ insufficient in an action of slander and the judgment is reversed in the King's bench, a Jury of Inquiry will assess the damages after the judgment of reversal has been rendered togather with all the costs.

But if such a writ is brot to the Exchequer Chamber as there is no jury to this court if the judgment is reversed- if the judgment is reversed it must be remanded back to the first court having a jury where it was last tried, for it is not consistant with the constitution of this court to restore all which was lost according to the rule above. And this is the only object of remanding any cause back to the court below. For if in such case the Court of Exchequer should find that the declara=tion was insufficient on the Deft's taking the writ after the court of King's bench had found it sufficient, their judgment would be rendered here and not remanded back because they may as well restore what is lost as any other courts.

If the reversal is on an interlocutory judgment as on a plea of abatement which was decided sufficient in a lower court- there the

Remarks

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Judgment is a Respondeas Ouster in the court of Error if it is consistent with their constitution — And here they restore all which was lost by abating the writ.

But if the judgment on a plea in abatement in the Kings bench should be adjudged erroneous in the Exchequer Chamber A respondeas Ouster would indeed be awarded, but it must be sent back to the court it last came from in order to be tried by a Jury on the merits —

In Con our courts have adopted the Eng principles, but enforce them in a different manner.

Our courts of error are the superior court & the supreme court of error the first has exclusive jurisdiction cognizance of all errors committed by justices of the peace, Assistants, and Courts of Common Pleas. The last the errors of the superior court. No writ of error can be taken from the judgment of the court of probate in this state, tho' appeals in the nature of writs of error are taken & the judgment rendered there the same as on writs of error —

These writs are taken to the superior court for every possible error in point of law — And Mr Reeve thinks contrary to the intention of the legislature as they must have intended that the county courts should be the dernier resorts in many cases of exclusive jurisdiction — As respecting Highways &c. But the practice is now otherwise —

In Con. a judgment upon a writ of error as one upon a dilatory plea, after which the Pltf. may obtain a trial of the case upon the merits — And this whether the Deft. obtains the reversal or himself — He may in both cases

Remarks

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try the cause in the higher courts as if it was appealed.

But if the Pft. in certain cases after the court have decided the question in error should enter for a trial notwithstanding, he must be pursuing a Phantom. As if the court should determine his declaration altogether insufficient. Then suppose A. sues B. in the County court and offers an objectionable witness to prove his claim, who is admitted. Suppose that B. files a bill of Exceptions, the merits of the case are then tried and A. recovers £100. B. sues out a writ of error upon his bill of Exceptions and obtains a reversal. Now it may be politic in A. to enter for a new trial in this court notwithstanding the Deft. has obtained a reversal against him, for in all likelihood he will gain it on the merits.

And in this state writs of error lie from decisions in Chancery where the error is apparent on the record as from decisions in courts of law.

If the Court of error to which the cause is taken, can try and finish it, they will put an end to it. But if from the want of a jury or any other cause they cannot try it, they must send it back from the court from whence it came.

Then in our supreme court of error no damages can be assessed and where these are necessary the cause must be sent back to the lower court.

On a writ of error the Pft. never recovers any costs in this state. But if the Judgment on the writ is in favor of the Deft. in error he recovers cost. Our Stat. limits the time for bringing writs of error to 3 years after the Judgment.

Remarks.

1 Roll 770.
Gelv. 179.
3 Com. 177.

2 Bac. 231.
2 Gelv. 108.
Mod. 578.
3 Com. 89.

3 Co. 19. 148.
Co. Eby. 378.
Mod 578.
Co. J. 246.

But if the sheriff sell property taken on execution men to a stranger when he is not bound by law to sell it this is restored by reversal As if goods of an outlaw are taken by a capias ut When the sheriff is not bound to sell but to keep them for the king. 2 Bac 232. 1 Roll 778. 5 Co. 90. 3 Bac. 178.

1 Roll 778.
3 Co. 148.
Co. J. 278.
Gelv. 108.
179. Bacon. 107.

The rule laid down by Coke is that collateral things executed are not divested by a reversal. But collateral things executory are. So if one in execution on the original judgment escape, and before judgment recovered against the sheriff for the escape the original judgment is reversed the action for

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Of the effect of a Reversal of a Judgment.

This is materially the same every where. If the officer has taken the body and the Judgment is reversed, he is not liable as a trespasser, for the judgment tho' erroneous was good for all purposes until reversed. And the execution which issued upon such judgment was a sufficient warrant for such the officer.

If property had been taken and sold before the judgment was reversed the party obtaining the reversal is clearly entitled to all that he has been damnified. But suppose a favorite yoke of oxen are taken and sold to a third person at the post, it is Judge Reeve's opt opinion that the did not intend that what he lost should be restored specifically, thence the purchaser would hold the cattle and the party must be paid in money. This idea is founded in policy merely; for no person would purchase under an execution, if he could not be protected safely safely in the enjoyment of his purchase.

But suppose we had a writ of Elegit as in Eng on which the cattle were appraised off to the creditor and not sold, In such case if the judgment is reversed the party takes back his cattle and not their value, since no third person is injured.

In Con. where land is levied upon the judgment creditor takes possession. And if the judgment is reversed the possession and title are recovered back and not the value of the land.

But suppose when the Judgment creditor obtains possession for session, that he sell to a third person. shall the debtor on a reversal

the action for the escape is gone. Aliter. If Judgment and Execution had been obtained (in the action for the escape) before Judgment reversed, then the judgment would remain notwithstanding the writ of error — for here the collateral thing is executed 8 Co. 142. a. b. 1 Saund. 34 or 84. But in the last case the sheriff ought to be relieved by an audita querela. Co. J. 646. 2 Bac. 2 31.

1 Ster. 139.
2 Dr. 808 l. u.
4 Bac. 197.
199. 262 —

2 Bac 220.
8 Co. 59.
Roll 459.
Co. J. 81.

1 Roll 776.
Co. J. 299.

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recover back the land the land of the creditor or its value in money?

This question never has been decided and now remains to make a great figure in our courts. It is contended on one hand that by analogy to the sale at the post, the vendee ought to hold. But contra it is urged that no principle of policy justifies it in this as in that case.

Judge Reeve thinks that the original owner ought not to be deprived of his property and that the vendee should be ousted.

Judgments may be affirmed and reversed in part only, tho' it is difficult, indeed impossible where the Judgments are entire. But when the judgment is for two distinct things, as for debt and cost, here it may be affirmed in part as to the debt and reversed as to the costs. This is the great question. Can you divide the judgment? As where in trespass the stat. in certain cases allows no more cost than damages if the court should render judgment for so much damages and full cost amounting to more than the damages. Here the Court of Errors would affirm the judgment as to the damages and reverse as to the costs. So in judgment on our statute stat. of bastardy, when Ct. say that all the maintenance shall be recovd at once. So if Hus. & Wife in Great Britain suffer a fine and common recovery. When the wife is a minor. This is void as to her tho' good as to the Husband and this is the nature of a judgment.

In Con. we have improved this distinction in one instance where it has not been in G.B. As where A. sue B. and C. for trespass, & B. is a minor if judgment is rendered against both, the Eng. courts reverse it as to both, since B. was not sued by Gardian. But our courts have affirmed

Remarks.

Sid. 293.
Palm. 187.

Sh Co. 143.
Rutty 77.

the judgment as to B. and reversed as to C. on the most correct principles in my opinion.

When one judgment depends for validity upon a prior one, the reversal of the prior one has an effect upon the latter, but the last cannot be said to be reversed by the reversal of the first; tho' on this subject there is a difference of opinion.

As if an executor should be sued as such and execution should issue against the assets in his hands but if he did not pay in this case, we will suppose a *ri. fa. fac.* to issue against the executor himself *de bonis propriis*. Now if the first judgment is reversed, this undoubtedly is a good ground for an *Audita Querela*, but does not reverse the last judgment.

And if the execution in the last case has been satisfied, after an *audita querela* the money so paid can be recovered back in an action of Ind. Ass.t. It is no objection to this action that a judgment has intervened for this proceeds on the ground that something accruing since judgment was rendered, makes it inequitable for the party any longer to retain the money and thus in like all cases of Ass.t.

As if one sued procures bail and execution follows a judgment against him and so returned *non est*: then the *bail* is liable but if the judgment, but if the judgment against the principal is ~~reversed~~ reversed this is a good foundation for an *audita querela* in favor of the *bail* tho' the judgment against the latter is not reversed by it.

There is one set of cases when actions are brought on bonds conditioned for performance by instalments. Whenever the first becomes due, if

Remarks.

11 Co. 115.
Raym. 286.
Cyler. 43.

If the error be in the process. Error coram nobis lies but there is not error in Judgment H. R. B. 21. Pyhh. 181. 1 Roll 746. 16. And when the error in law is occasioned by default of the clerke of the court, or sheriff or other officer of the court error coram nobis lies - 1 Sid. 208. Roll 746. H. R. B. 21. 5 Com. 286. 1 Roll 1: 4 —

3 Bac. 197. 157.
Croy. 511.
3 Com. 177.
1 Vent. 207.
5 Com. 97.
286. Salk.
400. 2 Roll
50. a 59.
3 Bac. 197.
217. 2 Ba.
228. Carth.
122. 174.

the obligor fails, the penalty of bond is forfeited, and the whole is recovered, but the court will shorten it down to what is due at the first payment and the bond is kept as security for the payment ~~of the rest~~ performance of the rest. And upon a second failure when a second instalment becomes due a scire facias issues on the former judgment and this also is collected. Now if the first judgment is reversed there can be no second for a scire facias. Yet a judgment upon the scire facias will not be erroneous but an audita querela is the proper remedy for the obligor.

It is a common mistake with the jury to find in many cases more damages than are demanded. If judgment is rendered in pursuance of such a verdict it will be erroneous. But the Plfts. in all such cases pay the consequences by suffering a discharge of the surplus on the judgment or execution — So where the cause of damages is certain, fixed, and definite as in actions on notes or bonds - if the Jury find more damages than are strictly due by the instrument Judge Reeve thinks this also must be reversed to prevent error.

It might be otherwise where there is any room for presumptive damages and for smart money. As in Trover & Slander, Trespass &c

2d Of Errors in Fact - Writs of error of this kind are founded upon the supposition that a fact is existing dehors the Record which renders the judgment erroneous as if judgment should be rendered against a Feme covert or against a minor who is sued without his guardian upon default. These facts however do not appear on the record.

Remarks.

T. Ray. 59.
5 Com. 286.
Carth. 388. 9.
4 Mod. 146.
Stra. 689.

1 Roll 761.
1 Sid. 147.
1 Vent. 252.
Yelv. 57.
Carth. 393.
Lean. 105.
Dyer 82a

Salk. 262.
Co. Lit. 69.
Lev. 76.
5 Com. 301.
Co. Lit. 12.
Co. J. 568.
Hob. 264.
Dyer 89.
Cro. Elz. 469.

Writs of Error.

This writ may be brot and usually is in Eng. before the court which rendered the erroneous Judgment. Hence it is called a writ of error coram vobis in contradistinction to those writs brot for errors in law which are denominated Coram Nobis. This was not our practice formerly tho' it is now becoming quite common in Con. Formerly all writs of error of both kinds were taken to a higher court than the one which rendered the judgment complained of. This was not a good practice as the county courts may as well correct errors in fact any other court in Connecticut.

Of Assigning Errors. It is a general rule that errors in law and fact cannot be assigned together. For all errors in fact if denied must be tried by a jury jury. But We have no objection to writing them as well as a demurrer to one part of the Pleadings and the Gen. Issue to the other. But our late practice respecting bringing the mode of bringing writs of error Coram Nobis seems to prevent their being joined. And if they are joined it may be demurred to for duplicity. Tho' it is said a Gen. Demurrer will reach the defect. So assigning several errors in fact amounts to duplicity or if several errors in law are assigned 2 Bac. 218. 1 Sw. 6. 5 Com. 300. Fitz. Ma. Bre. 20.

So also it is another rule that no fact against the record can be assigned for error. For the record is conclusive as to all allegations of facts which it contains. As if Judgment should be rendered in this manner "J. S. by T. M. his Attorney &c" the party cannot assign for error that T. M.

Remarks.

102 Lev. 134.
Dr. 242.

5 Co. 29.
8 Co. 59.

1 Roll. 83.
1 Salk. 268.
2 Ld Ray. 1005.

Writs of Error.

was not his Attorney for he was dead two years before because the record is con=clusive. He must seek some other mode of redress for the mistake.

There has been much dispute whether if Judgment is rendered by one as a Justice, Error can be assigned on the ground that he was not a Justice having never taken the oath required by law as a necessary qualification. And if so whether this is not an assignment against the record. On this question there are but six decisions reported in the books; The of which are for the assignment and three against it. The question therefore re=mains sub lite.

There has been a considerable degree of discussion likewise on this question. Can a party reverse a Judgment rendered in his own favor?

It is settled that he never can reverse the judgment unless he can shew clearly that it is to his disadvantage. And how can he shew this since no witnesses can be introduced to shew it? Judge Reeve declares himself very much perplexed with this question and he finds no clear ideas upon it in the books.

Suppose the error to be an error in law, but the plea such as to involve a question of fact. As if the Deft. in Error should plead that since the judgment complained of was rendered the Pltf. executed to him a release of all suits, errors &c this is traversed and must go to the jury if the court has one and the point of law assigned as error stands for an after consideration if the Defts plea is ~~insufficient~~ found against him; otherwise the writ abates.

Remarks.

3 Bla. 429.
1 Bac. 662.
4 Burr. 1966
1 Co. 18a.

B.N.P. 310.
1 Rell. 324.
Ruby 168.
2 Salk. 426.

B.N.P. 316
1 Bac. 667.
2 Jones 117.
2 Show. 283.
147.

Writs of Error.

A Diminution of the record is where the writ of error recites only a part of the record, and this is alledged – When the court proceeds to issue a mandate to the lower court to certify up the whole record and if it comes up certified, if it agrees with the present record then it avails nothing, but if it is variant from the record as recited it is substituted in its place and the cause proceeds ut supra –

Of Bills of Exceptions.

A bill of exceptions is a statement of facts annexed to the record for the purpose of laying a foundation for a writ of Error – This statement consists consists of facts not originally appearing on the record, but which are the foundation of some interlocutory judgment which the party against whom the judgment was supposed to be erroneous – It is called a Bill of Exceptions because it contains exceptions to the interlocutory judgment.

This mode of founding error was unknown to the common law, and introduced by statute Westm. 2d (13 Ed. I.).

This stat. made it the duty of the court to certify their opinion to the court above in this manner; hence bills of exceptions are properly considered the acts of the court, tho' the attorneys draft them –

A bill of exceptions being to found a writ of error cannot be taken except in a court from which a writ of error lies, or from courts not of record – Ex. the court of court of Chancery in Britain –

Remarks

Cro. Car. 249.
a. 341. 1 Bac.
326.

2 Sid. 876.
B. & P. 318.
2 Lev. 237.

1 Vent. 366.
B. & P. 316.
Relyng 15.
1 Salk. Con.
5. 2 Raw. 482.
Kirby 389.
41 Ola. Reg.
5 & 5. Crok.
161. B. & P.
439.

1 Bac. 385

B. & P. 316
1 Bac. 326.

Bills of Exceptions.

So in Con. this bill cannot be filed in a court of Probate — for every judgment, sentence, determination, denial or order of this court may be appealed from to the superior court — Mean it be filed before the commissioner on an insolvent estate in Con.

If a party offer to demur to evidence and is overruled he may file a bill of exceptions —

So if evidence objected to be admitted or rejected a bill of exceptions may be taken by the party against whom this interlocutory decision is had — this is also a ground for a New Trial —

It is a general rule that bills of exceptions are not allowed in criminal cases. But they have been allowed on indictments for trespass.

The object of this bill being to draw before a higher court a judgment of some collateral point, it is regularly not allowed with respect to the general merits of the case. One therefore containing a general statement of the facts and arguments is inadmissable tho sometimes practised in Eng. A bill brot on such a bill in Con. must state —

The bill in Eng. is authenticated by the signature of the judges or of one judge — In Con. the bill is certified by the chief justice or presiding Judge —

The bill must contain a statement of the interlocutory judgment and of the facts on which it was founded. In Con. it is usual to state in addition to these the ground of objection and the arguments on both sides. And the reasons of the court — tho' the last is by no means necessary.

Remarks

Bills of Exceptions.

Form of a Bill of Exceptions.

Litchfield County ss } Bill of Exceptions —— A. vs B.
Superior Court } Action of - - - - - Plea of - - -

On the trial of said cause the Pltff. offered D. S. as a witness to prove certain facts (stating them particularly) The Deft. objected to his testifying to these facts on the ground that D. S. was interested in the trial for that &c (stating the grounds) But the Court notwithstanding admitted him to testified whereupon he testified — And thereupon the Deft. ~~testifies~~ excepts to the decision of the said court and prays that his said may become a part of the record.

NB. the of D. S. must be alledged in some part of the bill. And it is usual to give the reasons of the court but is by no means necessary.

This bill is not a supersedias of the judgment, but merely enables the party to obtain a supersedias by writ of error. 12 Mod 609. —

The bill must be tendered on the entertainment of it reduced to writing at the trial — Salk. 288 — Holt 301. B. R. P. 315.

If the facts in this bill are truly stated the Judges are bound to certify, that is, to sign it; otherwise not — And if the judge refuse to sign it. A writ lies in C.B. on the stat. Westm. 2d commanding it to be signed — B. R. P. 316. Show. 116. 2 Lev. 237. 1 Bac. 326 —

Remarks

New Trials.

Remarks

3 Bla. 388.
1 Bur. 395.
2 Lev. 202.
6 T.R. 618.

1 Ple. 213.
5 Bac. 240.
3 T.R. 131.
Stra. 401. 1096.
3 Bla. 349. 8.
Salk. 648.
Cowp. Bur. 395
or 896

9 Bla. 396.

1 Brook. 2.
1 Bizz. 319.
2 T.R. 45.
3 Bla. 391.
2. 2 Wils
30 L. J.
Bullar 326.
3 Ld. 644. 8.
4 T.R. 467.

New Trials.

New Trials are granted on principles of Equity unembarrassed with the technical nicety of law, and are governed by similar rules to those in Chancery.

At present it is admitted that a power to grant new trials under in all courts whatever of a general jurisdiction (as our county courts in Iow.) tho courts of limited jurisdiction (as our justice courts) have no such power.

How these originated is very uncertain, there is no statute authorizing them; neither can they be derived from ~~the~~ any one law principles, but were most probably established by the courts of law without any restrictions.

Hence were they so formed as to do substantial justice between the parties when one trial had not and could not do it.

They were very rarely granted till within one hundred and fifty years — so that the subject remains free from those shackles which the rigid ideas of those who administered the ancient common law necessarily have imposed upon it.

The great object of courts in granting new trials is to do substantial justice between the parties — that is to establish what ~~is right~~ would be right and just between them independent of all general laws and in a state of nature.

Thus tho the verdict of a jury in many cases may be contrary to law yet the courts have refused to grant a new trial because that verdict effected substantial justice tho contrary to rigid law.

In granting new trials the court do not decide the cause in favor of the parties obtaining them, but merely give them an other opportunity

Remarks.

1 Mod. 2.
3 Bla. 392.
Salk. 648.
3 Bla. 392.

to try their cause.

The effect of a new trial is to introduce the same cause into court de novo. And all the former proceedings are as instanter done away and as tho' they never had existed. As if Execution has been obtained in the cause on the first trial and levied and the property has been sold. Indeb. Assp. lies immediately for the money as tho' no former judgment had been rendered. If land has been levied upon and conveyed to a third person, the title derived under the execution is void. Indeed in every possible case except one does a new trial sweep away all former proceedings. The exception is where property has been taken and sold at the post, it cannot be recovered specifically from the bona fide purchaser because the principles of policy demand that third persons who purchase according to law should be ~~uncovered in their purchase~~ secured in their purchase.

This general effect of New Trials of sweeping away all former proceedings is fraught with a variety of evils. But the courts have exercised a controlling power which prevents these deleterious consequences. Thus they direct the party petitioning for a new trial to give sufficient security to the prevailing party on the first trial, that he shall acquire any thing if he prevails on the new trial, which he could have acquired if it had not been granted. As if on the former execution the body of the petitioner for a new trial was committed to gaol. If this is granted he must give security to the adverse party that his body shall be forth comming if he prevails in the new trial. As this power is discretionary with the court they fix what terms they

Remarks.

4 Burr. 2099.
4 T.R. 788.
6 Bac. 246.

2 Wils. 309.
1 Salk. 64.
647. 648.
4 T.R. 470.
Stra. 425.
Com. 402.

New Trials.

please to the grant — and almost always they direct the petitioner to pay all the costs which have hitherto accrued —

Courts will not grant new trials — 1st Where there is no equity in granting it altho' the verdict was contrary to law — 2d Where it would subjected to minister to the passions of men — 3d Where the object of it is to introduce a new defence which is indeed legal — but opposed to the justice and equity of the case — Nor — 4th Where if the former decission had been otherwise it would have operated merely as a punishment upon the party — On this principle — that it is improper to expose a person to punishment twice —

Causes for granting New Trials.

Courts will grant new trials for many important and equitable causes. As — 1st Where the verdict on the former trial was contrary to law. In this case there is no dispute about the facts in the case between the Court and Jury, but the decission of the Jury upon those facts is entirely against law — Thus if A. claiming under C. should sue B. in Ejectment and it should appear that C. gave the deed while he was out of and B. in possession which by law is void. If the jury in such a case should find for A., the court would grant a new trial because this is contrary to law — Still however if no injustice is done by such a verdict, the court will not even in this case grant a new trial

Some unaccountable circumstance has prevented our court in Con. from granting any new trial for this reason and the idea is entertain=

Remarks.

5 Bac. 247.
2 90. 1 Bin.
14. 322.
2 Burr. 664.
B. R. P. 327.
3 Pla. 392.

2 Stra. 1140.

Cowp. 17.
B. R. P. 327.
2 Wils. 244.
204. 205.
252. 405.
3 Wils. 18.
Styles 162.
2 Wils. 62.
Str. 691. 2.
13 R. 677.
4 Bac. 657.
5 Bac. 2. 50.
2 T. R. 516.
3 Wils. 18.

New Trials.

=ed by many that they do not deem it a sufficient cause — But Judge Reeve de=
=clares that he is authorized to say that the court would grant a new trial
in such a case, for they consider this a good cause —

2d Where the verdict is against the evidence. But in such cases
the court is very tender of granting new trials on this ground — For it seems
to be the exclusive province of the jury to judge of the evidence. And no
cases yet have been found where a new trial has been granted except
where there was none, not the least evidence to support the verdict — or if
any, so very slight that it could have no influence on a man of common
understanding. And in no case will the court grant a new trial because
the weight of evidence is against the verdict — for in Litchfield county
where four witnesses swore positively and directly against a single wit=
=ness and the jury found agreeably to the testimony of the individual, the
court would not grant it — Yet a new trial is seen granted altho' the verdict was
entirely contrary to the whole evidence and against law, provided that the court
are convinced that substantial justice was done by the former finding Salk.
654 or 584 or 884. —

3d Where ~~exclusive~~ excessive damages have been given by the Jury — Judge Reeve
has been favored with a view of all the cases on this point, amoun=
=ting to one hundred and twenty — And but three new trials were granted
above them all; and one of these is supported by no reason in the books —
This proves that for this cause new trials are very seldom granted indeed — Even
in all the Wilkes cases not one new trial was granted tho' very high damages

Remarks.

5 Coke. 15.

3 Atk. 140.
740. 2. Atk.
1051. 1 Atk.
425. 1 Salk.
647. 1 Burr.
332. 2 Ath. 36.
5 Coke. 94.
Burr. 374.
Salk. 647.

5 Coke. 94.

Contra 10 Mod. 202. 3.
3 Burr. 1385.
2 Ath. 184.
6 Mod. 22.
222. Salk.
643. 5.

New Trials

was given and tho' the counsel felt in no way disposed to favor John Wilkes and his adhe=rents —

It is very difficult to lay down any rule on this subject with precision & certainty. Mr Rowe however presumes that the court will never grant new trials for this cause under the conduct of the jury in finding the damages in such as to justify the court in infering Gross Partiality in them. This is the best rule which he can lay down —

4th When the damages given by the Jury were too small — In all the cases of New Trials in the books not a single case is reported where the court have granted in case of a Tort — But in actions brot on contract, where the damages are necessarily certain if the damages given are too small, this must ~~arise~~ arise from some mistake or partiality in the Jury —

5th New Trials are sometimes granted for Misplading. By this is meant that where the defence made is a bad one when the party had it in his power to use a better. But this cause is operative only with certain qualifications. Viz the party must state not only what was mispladed but the defence which he wishes to improve and must shew that the last could not have been given in evidence under the issue joined in the former case. Then if the court upon enquiry into it find it all frivolous, they deny the new trial — And if a distinct defence is set up this must be expressly stated and testimony must be adduced to shew to the court what can be proved — And if it is reasonable, the court in such case will grant a new trial —

Remarks.

12 Mod. 584.
5 Bac. 252.
Salk. 298.
1 Wils. 78.
5 Bac. 252.
1 T.R. 84.
Contra { Pr. Ch. 144.
5 Bac. 252.

5 Bac. 252.

New Trials.

But where the party pleaded in bar when he ought to have pleaded the Gen. Issue he shall not be denied a new trial – As if a suit b/ B. for a secret assault and it should be pleaded that one mistress was present – If the Pltf. should reply that he was informer and on a demurrer Judgment should be given for the Pltf: Here a new trial will be granted in order that the Deft. may plead the general issue when his first plea in bar fails him & when the fact it is presumable that he is not guilty or if there was no assault &c As if a demurrer should be overruled and the cause thus go out – a new trial might be granted in order to have a trial on the merits which the demurrer prevented but this depends upon the circum=stances of each case – For if the Demurrer was intentionally frivolous & the court will not grant a new trial –

6th Another cause for a new trial is new discovered testimony In the Eng. books the ~~causes of new trials~~ cases for new trials for this cause are very few, because the petition must be brot forward so soon after trial in the English courts, that there is very little room for the discovery of new testimony. But it is such a reasonable ground for a new trial, that I presume it frequently obtains in the English courts, altho the cases are not reported. But in all the U.S. particularly in Lou. new discovered testi=mony is the great and principle ground for granting new trials –

But agreeably to the principles of policy (not of Equity) it is a rule that new trials shall never be granted for new discovered testimony, if it ~~might or could~~ have been discovered and had at the former trial by using

Remarks

5 Bac. 392.
8 Bac. 392.
5 Bac. 386.

5 Bac. 241.
1 Salk. 646.
3 Pla. 396.
2 Sev. 140.
1 Sid. 239.
Salk. 428.
439 or 455
Salk. 428.
4 B. & P. 1307.

New Trials.

due diligence —

Neither will a new trial be granted because a witness whom the party introduced at the former trial, forgot a most material fact which he now remembers; or did not relate it to the Jury — In such cases principles of policy and general equity prevail over the particular equity of peculiar cases. For if witnesses were allowed to come in after recovering what was wanted to make out the case — perjury and fraud would walk erect in our courts of Justice — It would be most dangerous! —

In con. the party in this case states in his petition the whole trial, the issue or point of it — that he has since discovered new and material testimony from such a witness — that this witness is S. S. and that he will swear thus and so — The court will then inquire of the witness what he will swear and if it is as the party states they will grant a new trial

The testimony adduced at the former trial will not be heard on the new — For the Judges are supposed to know that — But if the whole court should be changed at once this rule must be dispensed with —

7th No new trials have been granted where a judgment has been obtained against one party without a trial either by fraud of the party obtaining or by the false return of an officer &c &c. In Eng. the Nisi Prius Judge files his whole of the case, and on the day in banks he reports it, which is a conclusive statement to the ~~court~~ whole court — so that no testimony is admitted. And if the N. P. Court Judge reports that he is satisfied with the first trial there is no instance in the books where a new trial has been granted —

Remarks

As to the law respecting the conduct of the jury upon trials see 5 Bac 287. 251. 291. 281. 290. 282. 3 Bla. 375. 6. Com. 14. 1 Ventr. 125. Ryan 218. 12 Mod. 111. 1 Saund. 132. Ed Ry. 148. Co. Sect. 227. Mod 87. 88 –

5 Bac. 245.
7 Mod. 54.
1 Ventr. 30.
Stra. 129.
5 Bac. 250.
288. 291.
2 Sev. 140.
Stra. 642.
Salk. 645.
Co. Sty. 189.

5 Bac. 244.
545. 1 Mod.
144. 6 Ge. 642.
7 Ge. 59. 64.
10 Ge. 202.
262. 3 Bla. R.
327. 1 Sum.
717. ——

New Trials.

8th. New Trials are granted for some mistake, defect or misconduct in the Jury — As if the Jury should cast lots to find a verdict — or if one of the jurors is interested; or if he should converse with one of the parties about the suit &c &c.

In Eng. this cannot be made the ground of a nonst as it is here in Con. In this state therefore, if the party knew of the interest of the Juror in time to challenge him, no new trial will be granted for this cause.

The jury may sometimes mistake tho' Mr. B. knows of but one instance in the ~~books~~ English books and this cannot apply here — The mode of returning a verdict in Eng. is for the Clerk to ask "What say you Mr. Foreman" and he answers "for the Pltff. to recover &c" and the verdict is not written in G.B. as in Con. In one instance ~~aff~~ after some hesitation found for the Pltff: But the Foreman in returning it said "the Deft." which was immediately ~~excepted~~ accepted and recorded without a discovery of the mistake — In this case a new trial was granted —

9th. New trials are granted for some mistake in the opinion or some defect in the Judge of the Court — This has been very much agitated in G.B. but it certainly is a reasonable cause — As if the court have misdirected the jury, and this is now settled in Connecticut — So in Eng. new trials have been granted where the court admitted improper testimony, and no bill of exceptions was filed — So it is certainly proper in where the court are conscious of having delivered a wrong opinion —

Remarks.

Salk. 645.
10 Mod. 202.
3 Bac. 1885.
2 P.R. 134.
5 Bac. 255.
contra
10 Mod. 202.
Salk. 648.
6 Mod. 22.
222.

11 Mod. 11.
5 Bac. 252.
Salk. 645.
6 Mod. 22.
1 Vent. 30.
1 Bac. 322.
Stra. 691.
1 Wils. 98.
2 Mod. 22.
R. Ch. 194.

5 Bac. 253.
11 Mod. 41.

5 Bac. 252.
Salk. 645.

New Trials

And this last has obtained in Eqy.

10th New trials are granted sometimes where the Counsel have made a mistake or have guilty of misconduct – As where improper testimony has been admitted by the counsel without any objection and afterwards its irrelevancy is discovered a new trial will be granted the party – But where the counsel does not attend to the cause and goes away on the day of trial &c, no new trial will be granted for it is the party's fault to employ such counsel – still however an action lies against the lawyer in such a case for his negligence –

11th New trials are sometimes granted when the witnesses summoned, were absent at the time of trial; and sometimes not. Such an absence however is no ground for a new trial, if it is merely stated that they would not come, since then always would be collusion and fraud if this were the rule – In this case the witness may be used for not attending as if he takes refuge in his poverty and refuses to attend, the court will issue a capias and bring him before them, and suspend the trial in ordinary cases until he can be had –

If however the witness is arrested by the adverse party or by him reduced away from the court – Or if he is prevented from coming by a sudden accident or sickness, the court will grant a new trial, provided the witness makes affidavit of what he could swear and in their opinion it is material. And on no other condition will it be granted for this cause –

Pr. Ch. 194.
Salk. 653.
12 Mod.
584.

2 Atk. 19. 19.
Stra. 691.
Bla. Rep.
2. 98.
5 Bro. 252.
7 Cow. 152.
Salk. 647.

Hardw. 23.
7 Mod. 39.

1 Bur. 352.

New Trials

12th If a cause has been lost by the testimony of a person legally infamous a new trial will be granted in Equity – There is some difference in the books on this point – The last cause decided proceeded on the ground of neglect and carelessness in not taking advantage of it at the trial and adducing the record when it was known at the time. In other cases where the fact was not known at the trial or the party was so surprised by it judge he presumes a new trial was granted by the court – He knows of no case in the books where mere ~~[illegible]~~ want of the party ~~not known of the record~~ in a witness ~~who ought therefore not to have been admitted~~ was urged in affirmance of a new trial: But he thinks it ought to prevail ~~and~~ in one case he prevailed in Connecticut for this cause –

13th New Trials have been granted where the Jury have found a general verdict when directed by the court to find specially – This is not illegal conduct, for the Jury are not bound to find specially. This direction is generally founded on the application of one party or both & if the verdict be against the opinion of the court, a new trial will be granted.

A new trial in such case has been refused – but because it was after a trial at bar, in which New Trials were not easily obtained formerly –

14th New Trials may be granted from the peculiar circumstances of the case – There are but two cases in the books which prove this principle – The first was where the party demanded of his adversary to produce a writing which was material – as he had a ~~[illegible]~~

Remarks.

1 Burr. 390.

1 Sev. 94.
1 Sid. 131.
Salk. 649.
4 Burr. 2108.
3 Bac. 384.
6 Mod. 22.
5 Com. 155
Stra. 691.

New Trials.

right provided he had given notice previously. The party objected to producing the writing which made against him, on the ground that he had no notice and thus obtained ~~this~~ case his case – there the court granted on the ground that he had unjustly recovered by a species of legal finesse and trick. The other case was where the Deft. challenged that the obligation was obtained from him by fraud and insisted also that it was vitiated by forgery – In the trial the whole drift of the counsels arguments went to shew the forgery under the general issue and the Jury overlooked the fraud and gave a verdict for the Pltf. Here the court granted a New Trial as the Jury had overlooked the main object, viz. the fraud and had found their verdict on the sole ground that there was no forgery.

15th Misconduct of the parties as treating the jury, or of his counsel or any wrong influence, or any kind of Embracery is an other good ground for a new trial – Vide 11 Mod. 141. 5 Bac. 292 – Mod. 452. 5 Bac. 252. 3 Vent. 173. 11 Mod. 119. 1 Vent. 125. 4 Bac. 140. –

Embracery is an attempt to influence the Jury corruptly to one side, by promises, persuasions &c. – 4 Bla. 140 or 146. –

Cases where the court will not grant New Trials.

It is laid down in the books that a New Trial will never be granted after a new trial – But this is not law; the proposition has of late years been acknowledged untenable. –

Remarks.

2 Wils. 244.

6 Mod. R. 698.

1 Show. 336.
1 Salk. 446.
1 Lev. 9.
1 Sid. 158.
Stra. 899.
12 Mod.
1 Wils. 17.
3 Wils. 59.

New Trials.

Still however it has been contended that a third new trial could not be granted — this also is not law — for the court are not bound to any specific number of times in these. They may as well grant a thousand New Trials as one says Ld. Mansfield in Burrow & will in certain cases as often as the Jury oppose the court — Still however if it rests on a question of evidence it is presumed ~~by~~ the court would not grant several new trials, but leave this as within the province of the Jury —

No new trial will ever be granted on the part of the public in a criminal prosecution — this rule however has one exception. If the criminal has practiced fraud in such case on the former trial a new one will be granted —

An other exception is where acquittal is occationed by the misdirection of the Judge in point of law — Strange 1238. 5 Bac. 254. Salk. 646. 12 Mod. 9. 1 Show. 336. 1 ~~Lev~~ Lev. 124. 5 Term. 20. 4 De. 758. or 759. Contra Ld Ray. 63. —

But on the part of the criminal if he has been unrighteously convicted a new trial will be granted —

The above rules apply to all Qui tam actions where a penalty is to be recovered — and to all penal actions — indeed to all actions whatever where the Judgment shall operate as a punishment —

The question remains to be agitated in this state and to make a figure in our courts at some full future day — Whether the Court will ~~d~~ grant the Deft. a New Trial to prove money after he has once

Remarks

Stra. 995.

1 P. 274.
5 Bac. 250.
1 Salk. 644.
2 Jones 200.
Styles 458.

New Trials.

pleaded it and failed. There is no case of this nature in the Books nor has it met with a Judicial decission in Con. But if the court said in one instance, if the question was brought before them, that they should not have granted one — And Mr Reeve is of opinion that they never should grant a new trial, because first 1st The object of our law was to do justice between the parties and not for the sake of the Deft — how the plea goes to oust the Pltf. of his whole demand, or well that which is equitably due as the remainder. But this is administering to the corrupt passions of men for the purpose of executing the laws which is very improper. 2d This plea operates upon the Pltf. as a public prosecution and since the Deft. in case of a public prosecution can never be put twice in Jeopardy the Pltf. in this case surely is entitled to the same privileges —

It is a rule in Q. B. that four years acquiescence under the first trial is an effectual bar to a New Trial. But in Eng. there is no stat of Limitations —

In Con. a stat. of 1804 limits new trials to three years after the first — provided the grounds of the petition then were discovered. Since the time refers to and runs from the time at which the grounds of the new trial were discovered and to this alone —

New Trials are not usually granted in cases of slander — But there is no law against granting them in those cases — —

So no new trial is granted for any deff defect in the ~~pleadings~~

Remarks.

5 Bac. 253.
1 T.R. 225.
Salk. 448.
650.
Stra. 1106.
1 Bur. 823.
4 Ve 2 224.

D.N.P.
326.
3 Salk. 962.
12 Mod. 275.
Stra. 814.
6 T.R. 638.

New Trials.

proceedings which you might have challenged on the former trial.

It was formerly holden that new trials were not grantable in actions of ejectment because they were not conclusive. But the rule now is, that new trials are as readily to be granted in these actions as in others if verdict be for the Pltff. tho' not so if verdict be for the Deft. except for very particular reasons; for when verdict is for the Pltff. it changes possession; otherwise when for the Deft.

In Con. new trials may as well be granted in all such cases as in any other whatever.

In Eng. where one of two Defts. only is found guilty and seeks a new trial the court very rationally refuse him one, if the one acquitted objects to it because they hold that a new trial revives the case precisely as it stood before against both Defts. and it is a hardy case to subject the acquitted one to ~~a new trial~~ an other trial.

But in Con. we hold that there is no necessity for reviving the cause against both and that a new trial may be granted in favor of the one convicted, and the rights of the one acquitted shall be no way affected by it, and the cause shall stand with only one real defendant. This is more equitable and just.

New trials are never granted to plead the stat. of limitations, for this is considered an so inequitable plea.

The Practice of the State of Connecticut.

Remarks

~~7th~~ 6th case

In Delaware as in the 5th case

In Maryland as in the 5th case

In Virginia both estates go to the neighbors and nieces of the intestate whether of the whole or half blood only the half blood take half as much as the whole blood per stirpes

N Carolina Black acre goes as in the last case and White acre goes to the neighbors and nieces whether of the whole or half per stirpes

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6th case continued Delaware as in the fifth case

Maryland as in the fifth case

Virginia both estates go to the neighbors and nieces of the whole or half blood ~~only~~ the half blood take half as much as ~~one~~ of the whole blood

N Carolina Black acre goes as in 5th case and White acre goes to all the neighbors and nieces

S Carolina The widow takes a moiety in fee & the grandfathers the other moiety & if there have been two grandfathers they would have divided between them that moiety

Ohio as in the fifth case as far as neighbors & nieces

While goes to the neighbors and nieces of the whole blood if they take by representation and if they do not take by representation it goes to the neighbors nieces whether of the whole or half blood and to the uncles and aunts and grandfathers for they all take as next of kin

Riley 201.
Stat. 26 –

1 Root 99
126.
1 Swift 106.

Trac. of Con.

In the first place I shall treat of the Jurisdiction of Courts of Law in civil causes - Their Criminal and Equitable Jurisdictions will not be noticed here, but under the proper titles -

The Courts now to be treated of are 1st Single Magistrates. 2d Courts of Com. Pleas and 3d The Superior Court -

1st Single Magistrates or Justices of the peace &c have original cognizance of all civil causes, where the title of land is not concerned, when the matter in demand does not exceed $15 - They have also original jurisdiction of all actions on note or bond given for money only, and vouched by two witnesses, where the demand is not exceeding $35 - If the note or bond is given for money only, but is vouched by only one witness, or has no witness to it a single magistrate cannot take cognizance of it, if it exceeds $15. But this jurisdiction is not final, for an appeal lies from the judgment of a single magistrate to the courts of common pleas where the demand exceeds $7. except in case of bond or note given for money only and vouched by two witnesses -

An arbitration note given for more than $15 and not exceeding $35 is not cognizable by a single magistrate, but if given for money only, and vouched by by two witnesses - For this is not a note for money only as the face purports but substantially given for performance of an award - If an arbitration note is over $7. an appeal will lie from the Judgment of a Justice rendering judgment thereon -

It has frequently been a question, where a note or bond was originally given for more than $35 money only, and vouched by two witnesses, and afterwards

Remarks.

In Ct. The case was this. The intestate left no relations except his grandfathers by the fathers side by the mothers and their children

New Hampshire the grandfathers divide the estates equally between them. 1 Bro. 138.

In Mass. intestate the grandfathers divide the estates equally between them. 3 Mass. 49.

In Rhode Island Black acre goes to the grandfather on the part of the father and White acre is equally divided between the grandfathers

Conn. Black acre goes to the intestates uncles on the part of the father White acre will be divided equally between the grandfathers — 1 Root 229. 316.

New York both estates go to the eldest Uncle on the fathers side to the exclusion of all other Uncles on A[illegible]

New Jersey both estates go to the eldest Uncle on the fathers side

Pennsylvania both estates go to the grandfathers to be equally divided as est. intestate left a widow she shall be entitled to half of the real property during her life in lieu of Dower. Stat. 425.6.

Delaware both estate go as in Pennsylvania

Maryland both estates go to the grandfathers on the part of the father

Virginia the estates are divided by one Moiety goes to the paternal & the other to the maternal grandfather

N. Carolina Black acre descends to his uncles and Aunts, who are the children of his grandfather on the fathers side and White acre is divided among all his uncles and aunts whether on the fathers or mothers side * 1 Root 344. 5.

Prac. of Con.

endorsed down to less than $30, whether a justice has jurisdiction of a suit on that note – The superior Court in the case of Paine vs Paine that the face of the note should give the jurisdiction that an endorsement cannot alter it, for that may be a part of the dispute; nor can a party waive part of his debt to lessen it to the jurisdiction of a justice – But since this decision they have determined that the sum due and demanded shall decide the jurisdiction 2 Root 60. 377. 8.

Mr. Gould supposes the first decision to be the most correct –

If either of the witnesses to the note or bond become interested or die the justice cannot take cognizance of it, if it exceed $13. The decision in Kirby overruled –

Where the title of land is concerned the stat. thus reads, that where an action of trespass is brought before a single magistrate for damage done on land, if the Deft. plads title to the land, a record shall be made thereof & this plea ousts the justice ousts the justice of his jurisdiction, after this plea made the party making it shall become bound with one or more sureties by way of recognizance unto the adverse party in a sum not exceeding $67. "that he will pursue his plea and bring forward a suit at the next County court in that county" this seems to mean that the Deft. should bring forward some process ~~or bring~~ or institute a new action in the C. Court to ~~bring~~ try the title – But the practice is different, the Justice certifies the whole proceeding or record in his court which is sent up to the C. Court where they proceed to try the title, and the Deft. must adhere to his original plea for he cannot alter it either without or upon motion –

Remarks.

South Carolina
The widow takes one moiety of both estates in fee
whilst the other moiety is divided equally
between the grandfathers

In Ohio Blacks have gone to the uncles and aunts Stat. 426.
of the intestate the children of his grandfather
on the fathers side While none goes to all Stat. 426.
his Aunts & Uncles or children of the fathers
on mothers side

In the case only the grandfather on the fathers side was dead and
the grandmother was living
In Pennsylvania the grandmother on the fathers 1 Roots 79.
side and grandmother ~~mother~~ father on the mothers Stat. 426.
side divide the estate between them
Massachusetts as in Pennsylvania
Rhode Island Blacks are gone to the grandmother
and Whites are divided between the grandmother Stat. 30.
then and grandfather
Connecticut Blacks are gone as in the 7th case
and Whites are divided between the grandmother
& the grandfather
In Illinois as in the 7th case
In Indiana as in the 7th case
Pennsylvania as in the 7th only when the deceased grandfather Stat. 149.
leaves the surviving grandmother & father
Delaware as in Pennsylvania
Maryland ~~Blacks are gone~~ Blacks entirely go to the uncles and Stat. 248.
Aunts the defendants of the grandfather on
the fathers side
Virginia the intestate intestate is divided in moieties
and one moiety goes to the grandmother and the uncles
and aunts on the fathers side and Blacks take both moieties equally
the other moiety
goes to the grandfather on the mothers side

1 Burt 108.

Trac. of Con.

If after the record is thus entered to the C. Court the Deft. neglects to prosecute up his plea, the statute says that his default shall be recorded and then a sire facias may issue from the County Court on his recognizance —

If he prosecutes his plea in the C. Court and fails to prove his title judgment is rendered against him for treble damages and costs —

But if after his plea of title he should refuse to enter into a recognizance his plea shall abate, that is his plea shall not be regarded, and judgment shall be rendered as if he had not made such plea and enquiry shall be made into the facts as if the Gen. Issue had been pleaded and on proof of the facts set up judgment of course goes against the Deft.

We have a late statute enacting that if an action is brot before a single Mag. for obstructing the waters of a river &c and the Deft. pleads specially a right to do it an appeal lies from the judgment of such magistrate to the County Ct. and from the C. Ct. to the Superior Court —

On every appeal abroad from the judgment of a single Mag. a duty of fifty cents must be paid and a certificate thereof made by the Mag. and if such certificate is not made, it will abate —

A single Mag. may take and except the confession and acknowledgement of any debt not exceeding $40. exclusive of the cost from debtor to his creditor either upon or without any antecedent process or the parties shall agree which confession must be taken from the debtor in person — An Attorney can not confess in Com. in Eq. Of this confession the Mag. must make a record and may grant execution — It has been determined that the judgment

Remarks.

N Carolina as in the 7th case
S Carolina the widow takes one third so far and
the grandmother & grandfather in the other moiety
Ga Ohio as in the 7th
7th case the lineal ancestors are dead
Pa & N. Hampshire ~~the~~ all the uncles and aunts
relations on the father's side, or mothers side should be the
estate pro capita of the whole or half blood
Pa Massachusetts & the same almost distribution
the whole Island Rhode Island where are distributed equally
pro capita among the uncles and aunts on the father's
side and distributes are entirely to all the uncles
whether on the fathers or mothers side whole or half blood
Con. Blood are entirely to the uncles & aunts of the father's
side whether of the whole or half blood. Distributes are
given to the uncles and aunts on the father's side
mothers side if they are of the whole blood and if there are
no such blood uncles or aunts of the half blood
New York as in the last case
New Jersey as in the last case
Pensyl ~~as in the last case~~ all the uncles & aunts
whether of whole or half blood on on the father's
on mothers side inherit the estate as next of kin
Delaware as in Pensylvania
Maryland as in the 8th case
Virginia the ~~whole~~ whole estate of both estates is divided
into moieties ~~and~~ and one moiety goes to the
uncles and aunts on the father's side of the other
moiety goes to the uncles and aunts on the mothers
side in both cases the half blood take but they take
only half as much as the whole

should express the particular debt or duty about which it is conversant, or bond note or book that the judgment may be a bar to an action brot for the same thing. The judgment must not be for more cost than the Magistrate's own fee if there has been no antecedent process. If there has been an antecedent process the cost of such process may be contained in such judgment and all this must appear of record—

But a mag. cannot take a confession on an arbitration note for he is to take confession only in case of a just and liquidated or else debt if the confession of judgment on arbitration notes be allowed the party can have no day in Court to object against the award let it be ever so irregularly made.

A single Mag. may under our statutes administer the oath prescribed by law to poor debtors—

If in an action before a single mag. a recognizance is entered into before him for more than $15 a sire facias will not lie returnable to the mag. to enforce it— The only way is by an action of debt before the county court.— For a sire facias is a judicial writ issuing regularly from a court in which a judgment has been already rendered for the purpose of carrying that judgment into effect: it can issue only from that court where the judgment has been rendered, or the suit is pending—

In all civil cases or where the title of land is in question or where the matter in demand exceeds $15 the County Court has original jurisdiction and likewise final jurisdiction where the matter in demand does not exceed $40. except in actions on bond or note given for money only and vouched by

N Carolina as in the 7th case

S Carolina in this case the Widow takes two thirds of both estates in fee and the uncles and aunts retain of the whole as half blood on rather on the fathers or mothers side equally per capita

Ohio distribution as in 7th case of the father's brother

8th case one ~~an~~ uncle was deceased and left children

Jersey as in the last case

Massachusetts as in the last

Rhode Island as in the last case

Con as in the last case

N York the eldest sons of the deceased Uncle takes both estates

N Jersey as in N York

Pennsylvania as in the last case only the children of the deceased Uncle will take what their uncle would have taken

Delaware as the surviving Uncles and Aunts take both estates ~~if the relation of representation~~

Maryland both estates go to the uncles and aunts the children of his grandfather on the father's side and to the children of the deceased Uncle such children take what their father would have taken if he had been alive

Virginia as in the ~~last~~ 9th case only the children of the deceased uncle will take what their father would have taken if he had been alive

Carolina Black uncles & sister's sons defend as in the 7th case only the children of the deceased Uncle will take the same as the uncle would have taken if he had been alive.

S Carolina the Widow takes two thirds in fee and the other third goes to ~~the~~ all the surviving uncles and aunts the children of the deceased Uncle take nothing for their father as negroes

* Ohio Above goes to the brothers & sisters of the father and the children of the deceased brother will be sharers. Which agrees to the uncles & aunts of the father's side children of the deceased brother

Prac. of Con.

two witnesses and so where the title of land is in question, and in this case if such bond or note exceeds $35. they have final jurisdiction by final jurisdiction. By final jurisdiction is meant that there judgment is not appealable from but they may be reversed on writ of error.

An appeal lies from the C. Ct. to the S. Court in all cases where the title of land is in question or where the matter in demand exceeds $70. except in actions on note or bond given for money only and vouched by two witnesses.

It is settled that the right of appeal is not determined as damages in the close of the declaration except 1st. where the damages are punitive as in cases of torts and 2d. where the action is founded on contract and the sum of damages cannot be ascertained without extrinsic evidence.

If it appears from the record, that according to the rules of ascertaining damages judgment cannot be rendered for more than $70, there can be no appeal merely from what appears at the close of the declaration. If an appeal should be granted in either of these cases by the county court, when it comes before the superior court, the appellee may plead in abatement that the cause may be dismissed & in one case the ex officio dismissed it from their docket.

Tho' a Plff. in an action on book should demand more than $70 yet if it appears from his own book exhibited on oyer that $70. is not due the Deft. may make it a part of the record and prevent an appeal it is to be taken advantage of by the Deft. when the motion for appeal is made by objecting to the appeal.

In this case the intestates relations living were the grandchildren of his Brothers the sons of his father some of them of the whole and others of the half blood and of the children of his mother of the half blood and the children of his uncles & aunts that were the brothers and sisters of his father and also the brothers and sisters of his mother

In New-Hampshire both estates go to the grandchildren of all his brothers whether of the whole or half blood & to the children of all his uncles and aunts whether of the whole or half blood or whether related on the part of the father or mother [illegible]

In Massachusetts the estate [illegible] children with the brothers & sisters of the half blood

In Rhode-Island if the grandchildren of the brothers & are representations of those brother & sisters as were the children of his father whether they are of the whole or half blood but if representation as aforesaid in such case of the relations it goes to such grandchildren and also to the children of the uncles and aunts on the part of the father and the same representation exists goes to all the grandchildren of the brothers and sisters whether of the whole or half blood or representation does not exist then the whole estate goes to such grandchildren and to the children of all the uncles and aunts. for they are all in the same degree of kindred (as Blackstone says) as in Rhode-Island & the whole estate goes if representation exists to the grandchildren of such brothers & sisters as are of the whole blood if it does not exist it goes ~~to all the~~ such grandchildren ~~of the brothers whole of the whole half blood & the children~~ and the children of the uncles and aunts on the father side

In New York both go to the eldest son of the eldest son of the intestate eldest male by the father side. If the grandchildren of the eldest son of the eldest brother were female they would take both estates

Princ. of Cons.

Yet in an action on an arbitration note for more than $70 if it appears from the record that the matter in controversy or the award is not exceeding $70 no appeal lies.

In an action on note or bond given for money only and vouched by two witnesses for more than $40. if one of the witnesses die or becomes interested an appeal lies from this court to the Superior court Riley 337. contra.

We have a stat. providing that in an action on a receipt against an officer for not executing an execution, no appeal lies from the judgment of the county court whatever the sum in demand may be — The same rule extends to a Justice's Court when cognizable by him; there is one exception to the above rule Viz. where an action is brot before a single magistrate for not serving an execution granted on a conversion of more than $7, an appeal lies. In these cases the officer is to have 14 days notice. But if an officer gives a receipt for an attachment and he is sued on such receipt an appeal lies as in other cases so also if an action is brought by an officer against a <u>receipts man</u> no appeal lies but in this case if the property is taken on <u>mesne</u> process an appeal lies —

From a Judgment rendered by the county court on an award by auditors in an action of account or Book debt no appeal lies —

If a cause is not appealable according to the provisions of our statutes no agreement of the parties can make it appealable; or in other words nothing the parties can do can sustain it in the superior court or the court appealed to —

New Jersey the distribution the same as in New York

Pennsylvania all the grand children of the brothers and sisters of the intestate together with the children of his uncles and aunts whether of the half or whole blood or whether related on the fathers or mothers side

Delaware — If representation

Pennsylvania if the terms issue means descendants however remote the grand children of the brothers and sisters of the whole blood take as issue but if by issue is meant immediate descendants only then it descends to all the grand children of the brothers and sisters of the intestate ~~whole~~ of the whole or half blood and the children of the uncles & aunts of the whole blood and whole and half blood ~~remote descendants~~ ~~remote~~ if by issue is meant descendants however remote ~~also~~ will be distributed to the grand children of the brothers and sisters of the whole blood but if it means only immediate descendants it will be distributed to the grand children of all the brothers and sisters whether of the whole or half blood and the children of all the uncles and aunts whether of the whole or half blood (both whole) in equal the widow has a moiety for life

In Delaware if there is in the case just any representation of the brothers & of the intestate then it shall go to the grand children of those brothers whether of the whole or half blood who were children of the intestate's father but if there are no representation then it must descend to all the grand children of all the brothers and sisters of the whole and half blood whether related on the part of the father or of his mother and to all the children of his uncles or aunts whether of half or whole blood or not related on the part of his father or mother — and whether or if there are any representations of brothers &c go to the grand children of the brothers &c of the whole blood if there are no representations it goes to the children were not in such case

the widow has a moiety for life

Rec. of Con.

No appeal lies from a judgment by default unless there was a hearing in damages and if there is a hearing in damages, and the party appeals he cannot have any hearing in the court appealed to, except as to the amount of damages. On a judgment rendered on nihil dicit in the county court an appeal lies to the superior court and then the deft. may plead as in ordinary cases. for his refusing to plead does not admit the Plffs right of action, as seems to be the case, in case of a default.

It has been decided that no appeal lies from the court of common pleas to the Superior Court in a qui tam prosecution for a crime by forth with process, the reason why an appeal is not allowed, is that the proceedings are criminal in form, altogether. From the court of a single Magr. in such case an appeal lies however small the damages, the appeal is here on the part of the Deft. and never allowed on the part of the public.

No appeal lies to an adjourned court in any case. The words of the stat. granting appeals are "to the next court" which has reference to the next stated term. But are not new actions allowed to be brought to adjourned ~~courts~~ terms?

The appeal must be taken in that term in which the judgment appealed from is rendered a party is allowed to appeal any time within the term, but it is best to move for an appeal immediately after the issue found or judgment rendered.

Appeals to the superior court must be entered in the docket

In Maryland Half blood acres goes to the grandchildren of those brothers of the intestate that were children of the intestate father whether they were of the half or whole blood and Whole acre goes to the grand children of those brothers of the intestate who were of the whole blood

Virginia both estates goes to the grand children of the brothers who were of whole or half blood only the grandchildren of the half blood take half as much as those of the whole per capita

N. Carolina Black acre descends to the children of those uncles and aunts who were children of his grandfathers on the fathers side & Whole acre descends to the children of all his uncles and whether on fathers or mothers side no regard ~~being~~ had to their being of the whole or half blood in either case and they take per stirpes

South Carolina in both estates the Widows take 1/3 on fee the other third is distributable to the next of kin all the children of grandfathers of the brothers as regard is had to the whole or half blood and they take per capita

12th case the same only the grand grandfather on the father side may be living

In Georgia both estates go to the grandfather

North Carolina both estates go to the grandfather

Black acre land of the grandchildren in this case take as representatives the grandchildren of his brothers whether of the whole or half blood who were the children of his father take its lineal course of descent

Its acres goes to father & grandfather

Whole acre of the grandchildren take as representatives goes to all the grandchild of his uncles and aunts on the mother side as well as on the father side and any regard to whole or half blood of the dead take as representatives in the grandfather dates W take acre

before the second opening of the court and not after - unless the appellant shall pay to the appellee all his cost to that time (which shall not be refunded however the cause may finally issue) which cost being ~~tad~~ taxed and paid the action may be entered before the jury are dismissed and not after if the appellant does not enter before the jury are dismissed the appellee may enter at any time during the term appealed to and have the judgment of the county court affirmed with the additional cost, but appellee is not obliged to do it, for he may sue on the bond.

An appeal from one court to an other destroys the judgment appealed from, unless the court appealed to is deficient in jurisdiction. The judgment in the court above, where the appellant enters, is a new substantive judgment, but if the appellee enters, the judgment is not a new one, but an affirmance of the judgment below in the court below. The judgment however in the court below, is suspended even where the superior court wants jurisdiction till the judgment is quashed in the court ~~below~~ above.

A state duty of one dollar $1 is payable in all appeals from the judgment of a county court - And unless there is a certificate that the duty is paid on the appeal, such appeal will not lie - This duty ~~must~~ must be paid at the time of taking the appeal, while the court is open, or the appeal will not be sustained - Suppose the ~~court~~ record says that the duty was paid, can evidence be admitted to prove that it was not paid, contradicting the record? (It is said and perhaps correctly) that the certificate is conclusive -

In Cons. Blacks were descends as in Rhode Island

Whole were of they ~~blood~~ grandchildren of the brothers of the whole blood ~~representat~~ take as representatives to their parents goes to them but if they do not thus take Whole were goes to the great grandfather as next of kin

N York. The descent as in the 11th case

N Jersey. The descent as in the 11th case

Pennsylvania. The word issue means any descendants however remote the distribution is the same as in the 11th case if it means immediate descendants only the great grandfather takes both takes

Delaware. The distribution as in the 11th case

Maryland. The distribution as in 11th case

~~Delaware~~

Virginia distribution as in the 11th case

N Carolina distribution as in 11th case

South Carolina distribution as in 11th case

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11 Ohio. If the grandchildren of his brothers & sisters ~~on the part of the father~~ the children of his father whether of the whole or half blood take as representatives then Black were goes to them if they do not thus the first grandchildren and the children of Uncles & Aunts whether of the whole or half blood on the part of the father take and

2 Whole were of the grandchildren of his brothers and sisters who were of the whole blood ~~and~~ take as representatives before descends to them if they do not so take then ~~the~~ it goes to them and the grandchildren of the brothers and sisters of the half blood and the children of all the uncles and aunts whether of the whole or half blood

Succ. of Con.

It has been decided that an Audita Querela is appealable, tho' the judgment complained of was on a note not appealable.

Either party may take an appeal except where the judgment is altogether in favor of the party wishing to appeal. If a Pltff. recover less than his damages demand he may have an appeal; and so may Deftn appeal if the Pltff. recover any thing.

If an appeal is denied when it ought to be allowed a writ of error lies. If it is allowed where it ought to be ~~allowed~~ denied no writ of error is necessary; for it is the duty of the superior court to quash it; but if they refuse to quash it in such case a writ of error lies to the supreme Ct. of Errors.

If a cause is not appealable and a motion is made for an appeal it may be defeated in several ways. 1st. He may object in writing to the motion in the court below. 2d. If the appeal is allowed, he may plead in abatement in the court above. 3d. He may move in arrest of Judgment. 4th. He may bring a writ of Error. 5th. It may be erased ex officio by the court either on motion or without it.

The Superior Court has no original jurisdiction in civil cases properly so called, except where a suit is to be brought against an officer for not returning a writ returnable to this court, and not returning an execution issued by this court. The Jurisdiction of the superior court is not exclusive in these exceptions for actions may be brot in the county court and most usually are.

Trac. of Con.

are –

This court has authority to issue writs of fieri facias to enforce its own judgments: this cannot be called an original writ, for it is merely to enforce a judgment already rendered, or to keep alive the proceedings in cases appealed from County courts –

This court has appellate jurisdiction from the county court in all cases where an appeal will lie from that court –

It has appellate jurisdiction of causes decided by the city courts and generally the same as those decided by county courts –

An appeal lies to this court from every judgment, sentence, decree, determination, denial order of a court of probate –

This Court has judgment of all writs of error but for the reversal of judgments rendered by the County Courts or single magistrates, or any erroneous decree Equity –

The Supreme Court of Errors has jurisdiction of writs of error in all respects final brought for the reversal of any judgment or decree of the supreme superior court in matters of law or equity where the matter complained of as erroneous is apparent on the records face but it can take no cognizance of matters of fact, for it cannot impannel a Jury –

This Court was instituted 1784. previous to which time the General assembly was the last resort –

It consists of the Governor Lieut. Gov.r and Council in which the governor presides and in his absence the Lieut. Gov.r or if he be

absent, the senior assistant present Eight of the council constitute a quorum.

Of the proceedings by which civil rights are enforced in our courts of Justice.

An action or suit is defined to be "the lawful demand of one's right" and it is by action or suit that all civil rights are enforced.

The first stage of a suit in Connecticut is the writ and declaration which according to our practice run together.

1st Of the writ. The writ consists of all that part which precedes the statement of the Pltfs. claim or ground of action; of the signature of the magistrate; certificate of duty paid; recognizance, if one; and the direction to the officer or indifferent person; the date is common to both the writ and declaration.

Our process is of two kinds 1st Summons 2d Attachment. By process in ment the means the means of compelling the deft. to appear in court or by giving him an opportunity to appear if he see fit, in order to hold him to trial. The process contained in the writ is called original or mesne process ~~contained in the writ~~ to distinguish it from final process or execution.

In Eng. the process is distinct from the original writ where the writ is a praecipe; but where it is a ~~sic facias~~ sic fieri remedium, then it issues as in Con.

Prac. of Con.

The writ in Con. must be signed, by a magistrate or clerk of the court to which returnable; it must describe the court to which returnable, and time and place of session.

When the process is by summons the direction to the sheriff or officer is to summon the Deft. to appear. When by attachment the officer is directed to attach the goods or estate of the Deft. and for want thereof attach his body, and him keep and have to appear before the court.

The writ ordinarily directed to the sheriff of the county, his deputy or either constable of the town where the Deft. dwells.

The writ may be directed to the sheriff only, or to the constable of the town only or to J. K. L. sheriff of — or to D. H. constable of — but whether a single direction to a deputy sheriff is good seems to be questionable.

Where the direction is to the sheriff generally or to the sheriff by name his general or special deputy may execute the writ. In ordinary cases the writ must be directed to some one or all of these officers. But the stat. provides that when a proper officer can not be had to serve the writ without great chase and expense and inconvenience, it may be directed to A. B. an indifferent person — And the name of such indifferent person must be inserted by the magistrate in his own hand writing and the reason for such direction must be inserted in the direction. It would seem from our stat. and from a rule laid down in Root's reports that the reason

Prac. of Con.

should be inserted by the magistrate ~~in his own hand writing~~ himself as well as the name of the indifferent person; yet the practice is universally otherwise for the reason is inserted by the draftsman and the name by the magistrate. But it appears to me that the statute as much requires the reason to be in the hand writing of the magistrate as it does the name of the indifferent person. (The law is now different) It has been decided, that the indifferent person need not make oath to the truth of the return. But a special deputy sheriff must by statute make oath to his return.

It is not fully settled what person may be an indifferent person for this purpose but the circumstance that he is a bondsman in the writ is no disqualification. It has been decided by the superior court that the sheriff, deputy, or constable may be a bondsman in the writ which he serves.

The certificate of the magistrate as to the necessity of directing the writ to an indifferent person is conclusive and cannot be questioned.

It has been decided by the superior court that a direction to a sheriff ~~or~~ an indifferent person is ill. but it has been holden by them that a direction to a sheriff and ~~and~~ indifferent person is good.

If the return of the writ directed to an indifferent person is altered from one time or term to an other the writ will ~~al~~ abate because the necessity which exists for such direction at one time may not exist at an other, but such alteration where the writ is directed to a proper officer will not abate it.

Trac. of Con.

A writ against a town may be directed to an ~~indifferent person~~ inhabitant of that town as an indifferent person. So on the same principle I suppose that a writ in favor of a town may be directed in the same manner.

It has been a question whether a writ could be directed to a minor as an indifferent person – but in the case of Tyler vs Tyler it has been determined that a minor is not a person ~~capable~~ in law capable of having writs directed to him as an indifferent person to serve and return –

A justice of the peace can issue original civil process only throughout the county in which he dwells, for he is a county officer and so styled in all legal proceedings. ~~viz~~ Viz "Justice of the peace for the county of –"

A justice may issue final process or process of execution throughout the state. He may likewise issue criminal process throughout the state, to bring a delinquent to be tried before himself. So he may issue a summons throughout the state to bring witnesses before him to testify in such case –

It has been decided by the superior Court that a justice may sign a writ in favor of the town in which he lives. So I presume he may sign one against the town in which he lives –

Clerks of the superior and County Courts are authorized to sign writs returnable to these ~~respectable~~ respective court, but no others –

Formerly when there was but one clerk of the superior Ct. he had authority to issue mesne process into any part of the state returnable to his court. Since there has been one clerk established in each county

=ty, it is a question whether they can issue mesne process out of their respe=tive counties. The clerks of superior and county courts may clearly issue original process throughout their respective counties returnable to the court of which they were clerks.

The clerks of the superior and county courts may issue orig=inal criminal process throughout the state returnable to their own court; but it must be done during term time ~~and night~~ and under the order of the court.

It was formerly the case, that judges of the county court and justices of the Quorum could not issue original ~~criminal~~ civil process out of their respective counties. Since by a late statute they are enabled to issue throughout the state as fully as Justices of the peace may throughout their respective counties.

The Governor Lt. Governor Judges Judges of the superior court and Assistants are authorized to issue to issue civil process throughout the state whether mesne or final.

The writ by our practice must contain the names of the parties and the town and county where they belong. This in ordinary cases is the only necessary addition; but where the office or civil character of any of the parties is an inducement to the action that must be inserted; as if an Executor is sued or sues he must be described as "A.B. Executor of the last will and testament of C.D."

On all writs in civil cases there must be paid a duty at

the time of issuing them; their duty must be paid to the Mag. If the writ is returnable before a single magistrate the duty is 17 cents — if to the County court 34 cents — if to the superior court $1. If to the supreme Court of Errors two dollars. And a duty of $2 is also payable on all petitions of an adverse nature but before the general Assembly the same rates of duty are required on petitions in Chancery.

The stat. requires that the payment of the duty be inserted in words at ~~foot~~ full length on the writ by the Magistrate himself —

It seems now to be settled, that if such a certificate is not on the writ, the writ is not only abatable, but is strictly void; and the court may ex officio erase it from their docket —

If there is no certificate of a duty being paid the writ is not amendable — And the superior court have decided that a magistrate cannot amend his certificate of the duty —

The stat. provides, that a writ once filled up against a person cannot afterwards be filled up against ~~an~~ an other person, without a new duty being paid and a new certificate therefore on the writ and if such a writ is brought without a new certificate the court will ex officio erase it from their docket —

The statute requires a duty on qui tam prosecutions, for they are suits of the party and under his control and for his benefit, tho' the public is joined in the suit — No duties are required on public prosecutions. —

It is necessary to the validity of a writ in certain cases, that a bond

for prosecution is ruled - This is always required on attachments. The stat. requiring that on every writ of attachment the Pltf. shall give sufficient security to prosecute his action to effect, and to answer all damages in case he make not his plea good - The bond is taken by the magistrate to the adverse party. These bonds for prosecution, are not in the nature of bail bonds as many seem to suppose -

This security is taken by way of recognizance acknowledged before the magistrate who signs the writ at the time of issuing it. The Justice's certificate on the writ of such recognizance being taken is not the recognizance itself but merely a memorandum of it -

It has long been a question whether the recognizance is given as a security for the property attached, or whether it shall cover the costs only; Most of the profession hold that it is to secure the costs only. If the bond is given for the costs only it is absolutely nugatory to except the Pltf's bond for he is liable for the costs bond or no bond -

But it has been decided by the superior court in Fairfield county at the term of August 1798. that the Pltf's own bond is sufficient where he was of sufficient ability to pay at the time of taking it. I understand that this decision was on the ground of usage -

If it appears to the court before whom the writ is returned that the Pltf's own bond is insufficient the court on motion may order a new bond and if such bond is not given when ordered the court will dismiss the suit -

Prac. of Con.

It has been lately decided by the superior court that if a magistrate signs a blank writ and takes a recognizance, and the blank is afterwards filled up, that the writ will abate for the statute requires that the bond of recognizance be taken to the adverse party in the suit, which cannot be done where none is named in the writ.

According to our practice, a bond for prosecution must be taken on all qui tam prosecutions on forthwith process; for the courts consider them as attachments; but when a qui tam civil action is brought by process of summons a bond for prosecution is not required.

A bond for prosecution must be given by some substantial inhabitant of this state where when a writ issues in favor of some person who is not an inhabitant of the state; the necessity of which is apparent viz to secure the costs the Pltff. belonging to an other state. In all cases where bond for prosecution is required, the writ will abate if such bond is not ~~required~~ entered.

Our stat. also requires that a bond for prosecution shall be given by some substantial inhabitant of this ~~town~~ state where a magistrate issues a writ and it appears to him that the Pltff. is unable to respond the costs which the Deft. may recover against him this applies only to Pltffs who are inhabitants of this state.

But in this last case the writ (I conceive) cannot be abated for want of the bond. For the signature of the Magistrate is conclusive evidence that the fact of the Pltff. inability to pay costs did

not appear; and the stat. provides only for cases where the Pltffs' inability appears to the Magistrate – But if the Deft. prove to the court that the Pltff. tt is unable to pay costs, on motion, the court will order a bond to be entered and if the Pltff. refuses to procure such bond he will be non suited. It is sufficient to support the motion to the court that the Pltff. is unable at the time of the motion – such a motion must be made to the court within a reasonable time if possible for the Deft. should not move at so late a period as to give the Pltff. no time to procure bonds. It has been decided by the superior court in a motion made for such a bond after the cause was called on for trial and the Jury impannelled, that it was too late.

If the Mag. who takes the bond is guilty of no misconduct in doing it by which the Deft. suffers damages he will be liable to him in an action on the case. The rule is this if the bond at the time of taking it is apparently sufficient (altho' it afterwards becomes insufficient) the magistrate is not to be liable for he has done his duty – But if the bond is apparently insufficient when taken the the Mag. will be liable – This rule in both of its branches holds as well when the Pltffs own bond is taken as where that of a third person is taken – The law as to the writs of replevin is different from writs of attachment, tho' the last general rule applies to both –

Where the Pltffs own bond is taken on writs of replevin the magistrate is at all events liable if the Pltff. in replevin is

not mutually able to respond. The reason is that the Pltf's own bond cannot be apparently sufficient; for if the Pltf's sole bond on a writ of replevin was deemed sufficient, all the benefit intended by the law in allowing attachments would be totally defeated, for the property is attached as additional security to the Pltf., which he would not obtain if his adversary's bond might be taken on the writ of replevin.

On every writ of Error a bond for prosecution must be given with surety. In this case the Pltf's bond cannot be taken for the stat. expressly requires that a bond be given with surety. In none of the cases above mentioned, does the stat. require surety.

So every party appealing from the Judgment of one court to another must give bond with surety. Here again the Pltf's own bond is not sufficient. The appellant and bondsman are bound that the appellant prosecute his appeal to effect; by this is meant that unless the appellant prevails in the court above that the bond shall be forfeited, but that he prosecute. But if he does not enter his appeal in the court above, the bond is forfeited. And if the Appellant fails to enter the appellee has two remedies one by entering the appeal himself & take Judgment; in doing which the measure of damages, is Judgment obtained in the court below and costs. or he may omit entering and resort to his action against the appellant. By the appellants entering the appeal in the court above, the bondsman is released is released from the judgment but not released from the cost.

Trav. of Con.

In order to subject the boundsman, the appellee must take out execution and have a return of non est inventus as to the appellants personal property. The usual action brought on the bond is by writ of scire facias; tho an action of debt will lie.

The rule laid down as to boundsman being liable on appeals is applicable to boundsman on attachments and notwithstanding the appellant has sufficient real not property the boundsman is liable —

The entering special bail does not exonerate the boundsman for prosecution on an appeal or on original process; both are liable for the costs, if sufficient personal property is not owned by the principal —

Bonds for prosecution are not within the statute of limitations with respect to bail (As to bail the stat. is, that actions are barred in one year from the time that final Judgment is rendered —

Where is returnable.

According to our stat. in all transitory actions to be tried by the superior court or County court, the writ is to be returned in that county where the Plft. or Deft. dwells. This is different from the Com. law rule for there the writ must be brought and the writ returnable in that county in which the cause of action arises but the common law rule is waded by fiction in transitory actions and in certain cases the courts will change the venue —

Prac. of Con.

In Con. when the title of land is concerned, the writ must be returned in that county in which the land lies, without any reference to the county in which the Pltf. or Deft. dwells. In all actions of trespass quare clausum fregit, it has become the practice to bring them in the county in which the land where on the trespass was committed, lies altho they are in their nature personal actions.

It has been decided in Con. that a qui tam action for an offence is a transitory action and may be brot in the county in which the Pltf. dwells; and so I presume in the county in which the Deft. dwells; altho the offence was committed in an other county. When the offence is prosecuted by the public the prosecution must be brot in the county in which offence was committed.

Tho it is a general rule that all actions of a transitory nature must be brot in the county in which the Pltf. or deft. dwells, yet a writ of error to the superior court must be brought in that county in which the Judgment complained is rendered.

As to the time when the writ must be returned.

One stat. enacts that all writs returnable to the county courts must be returned to the clerks of said courts on the day next preceding the sitting of the ~~court~~ such courts and not afterwards. The construction given by courts to this stat. is, that they may be returned on or before

the day preceding the setting of the court. Late returns may be made by consent of the parties; for it is a maxim that a person may be permitted to renounce a rule of law ~~was~~ made for his own benefit. Under some circumstances the courts have permitted later returns without the consent of the parties, as when the officer who served the writ was sick.

All returnable to the superior court must be returned to the clerk thereof before the second opening of the court.

Writs returnable to the superior or county court must be made to the term next following the date of the writ, if there is sufficient intervening time to give legal notice. If it is made returnable to any other term than the next when the time is sufficient to be made returnable to the next term it may be abated ~~of~~ or if Judgment is rendered it will be reversed or vacated by order of the court ex officio for says (Mr. G.) the writ is void - a mere nullity.

Of Process and Service.

Process in Eng. (as before remarked) is "the means of compelling the Deft. to appear in court" But in Con. it is merely the means of holding him to that, and may be without his appearing in Court.

Our process is of two kinds 1st Summons. 2d. Attachment. When the process is by summons service is made by reading the same in the hearing of the Deft. or by leaving an attested ~~copy~~ copy ~~in the~~

thereof at his usual place of abode; but it may be made by leaving a copy in the hands of the Deft.

It is said that an officer is obliged to furnish the Deft. with a copy where the process is by summons but our stat. makes no such provision in case of a summons —

Where there are two Deft. in the state a ~~copy~~ copy must be left with each. But in cases where the Husband and Wife are sued one copy is sufficient.

The copy as before remarked must be attested; that is the officer must indorse upon the back ~~thereof~~ thereof that the within is a true copy of the original —

If the attested copy ~~is~~ not attested copy is not a true one the writ will abate —

If the writ is served by reading, the afterwards leaving a copy not a true one will not abate the writ —

It is frequently practiced for the Deft's attorney when the Deft. lives out of the state to acknowledge service of the writ; but it has been decided that an acknowledgment of service by the attorney without special authority for that purpose will not conclude the Deft.

Mr Gould thinks that Mr Reeve informed him that the superior court at New London had determined that the Deft. himself was not concluded by an acknowledgment in his own hand writing.

According to immemorial usage, all petitions and writs of

cuon, if the Deft. lives out of the state, a copy must be left with his attorney in the state.

It is said by Swift that if a person not an inhabitant of this state happens to be here, a service on him by summons will be sufficient to hold him to that.

When the process is by attachment service is regularly made by attaching the body or property of the Deft.

It is a settled point that service by reading or copy is suffi=cient to hold the Deft. to that altho' neither his person or estate are attach=ed.

The officer has no right to take the Deft's body if he can find per=sonal estate sufficient to answer the demand he knowing it to be the property of the Deft. (At com. law the case is otherwise) If an officer finds property to only half the demand he is not bound to take it & without direction from the Deft. he is not justified in taking it. But Mr Gould apprehends that an officer ought never to be liable to either party for omitting to take personal estate if he has any doubts to whom it belongs. For an officer is not required to run any person=al risque. Mr Gould apprehends that the officer ought not be liable to the Deft. for taking his body where he did not tender property, it being inaccessible to the officer.

The officer cannot hold both the body and the property of the deft. at the same time and he is not to take the body if he can

find personal property—

If the officer has actually taken the Deft's body he notwithstanding is bound to take personal property in lieu of the body if it be afterwards ten=tendered — Quere supposing after the officer has taken the body and then himself discovers property is he bound to take it. And the officer is on request made by the Deft. bound to attend him to the place where his property is; and if he refuses he is liable to the deft.

The Deft's land is also liable to be taken on attachment but the officer is not bound to take the land if he can find either per=sonal property or his body; nor is he justified in taking land when there is personal estate or body unless he has particular directions from the Plft: so to do; but if he cannot find either body or person=al estate he must take land —

Our stat. provides that if property real or personal, is attached the officer must leave with the Deft. or at the place of his usual abode if within this state a true and attested copy of the writ, and of his return describing the estate by him attached thereon and when any real estate is taken the officer serving the writ must have a true and attested copy thereof and a description of of the estate attach=ed at the town clerk's office in the town where the estate lies; and until the service is so completed, the estate so attached shall not be held by such attachment against any other creditor or bona fide ~~creditor~~ purchaser unless such copy is left in service within

seven days next after attaching the estate, and before the time limited by law for the service of such writ is expired.

But the omission of the ~~copy~~ copy directed to be left with the town clerk will not abate the writ. The object of leaving such copy is merely to give notice to the world of the lien that is on the land.

Personal property attached is not holden to respond the judgment against the debtor or any other person unless execution be taken out and levied upon it and levied within 60 days after final judgment is rendered. But there is an exception to this rule where the property attached is under a prior incumbrance, or pledged for debt, here the attaching creditor shall loose his lien upon it if execution is not taken out and levied upon it within 60 days after such prior incumbrance is removed.

As to real estate the lien created by the attachment is lost unless the execution is taken out and levied upon it and appraised and such levy and appraisal recorded within 4 months after final judgment, except where the estate is under a prior incumbrance and then it must be done within 4 months after such incumbrance is removed.

It has been a common practice for officers in this state where they attach real estate, to merely leave a copy with the town clerk and the Depty. without ever going on to the land attached; but it has been decided that the officer cannot attach without actually going on to the ground.

When personal property is attached the officer regularly takes them into his ~~possession~~ custody for the purpose of levying the execution

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thereon after Judgment is rendered, but he can retain them no longer than for 60 days after final Judgment this rule holds where there is no prior incumbrance—

The officer may and frequently does deliver the property the property attached over to a receipts man. By a receipts man is meant some individual who gives the officer a writing well executed expressing the receipt of such goods or chattels and thereby promising to redeliver the same to such officer at a time certain or on demand. But if the officer takes a receipt it is at his own risque, for he is not bound by law to take a receipt for personal property in any case—

The receipts man is not bound by a promise to deliver the property after 60 days from final Judgment and he may then restore them to the original owner without being liable on his receipt to the officer; for after the execution is out, the officer's authority over them by virtue of that execution has ceased. If after the expiration of the 60 days the owner should demand them of the receipts man his refusal to redeliver them to him would subject him to an action for the recovery thereof—

Visable property within this state tho' belonging to a person out of the state may be attached, and this attachment will be sufficient to hold the Deft. to trial and this rule holds equally tho' both parties resided out of the state—

Invisable property or debts due to a person out of the state may be attached by a writ of foreign attachment—

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If visable property in this state belongs to an absent debtor is not exposed to view service may be made on it by leaving a copy of the attachment with the person who has the custody of the property and such service will be sufficient to hold the absent debtor to trial.

If the absent debtor was ever an inhabitant of this state or has resided in it, a copy must also be left at the place of his last usual abode in the state.

The rule is the same where invisable property is attached. But in all cases when the deft. is out of the state at the time of the action commenced and does not return before the first day of the term (but cannot be an adjourned term for an adjourned term is only a continuance of the 1st term) if the Deft. does not appear at the second term, by himself or Attorney and be so remote that the notice of such pendingment could not probably be conveyed to him during the vacancy, the court may further continue the action to a third term and if he does not then appear judgment will be rendered against him by default.

If the Deft. is in the state at the time of service, his going out of the state after service and before the time of the court, does not authorize a continuance and so if the Deft. is not an inhabitant of the state, but is here at the time of service, his going out afterwards will not authorize a continuance or if the Deft. came into the state before court and after service, it will not be continued.

So if the Deft. is in any case willing to dispense with the continuance

there is no need of one.—

In all these cases where judgment is rendered against an absent debtor the stat. requires that execution be staged till the Deft. lodge with the clerk with one or more sufficient ~~securities~~ sureties in double the value of the estate or some recovered by such judgment, conditioned to refund or make restitution to the Deft. such sum as shall be given in debt or damage or so much as shall be recovered on a suit thereon to be brot within 12 mos after judgment rendered. If upon such suit the judgment shall be reversed annulled or altered the security afforesaid is to be no further answerable than for the recovery that shall be ~~mag~~ made upon such suit to be had within 12 months as afforesaid —

And if execution issues without such bond being lodged with the clerk the judgment is void as of which the Defts. (and no one else) may take advantage; such execution and all proceedings under it therefore are good and valid as to all other persons besides the debtor

Our statute also provides, that real estate taken upon execution issued against an absent debtor shall not be alienated or passed away until after the expiration of 12 months after judgment or after a ~~mo~~ new trial had on a suit brought within 12 months for the obtaining of restitution of such estate —

It was formerly the case in this state that if a writ of foreign attachment was brot before a single magistrate judgment might be rendered immediately. But by a late stat. if a writ of foreign

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attachment is brought before a single magistrate judgment be rendered immediately such magistrate in case the debtor be not in this state, and no factor, attorney, factor, agent, or trustee appear to defend in the suit shall adjourn the same for a term not less than three months and not more than nine months.

But suppose an Attorney, Factor, Agent, Trustee appear in the suit? Then I conclude that Judgment must be rendered immediately as before the stat.

If Judgment is rendered by a single magistrate against such absent debtor, the *si. fa* against the garnishee, is issued and signed by the magistrate who rendered the original judgment unless he is removed by death or otherwise, then any other proper mag. may do it.

When the demand in the sci facias does not exceed $15 it must be made returnable before the mag. who rendered the original judgment unless such mag. is dead or removed and then before any other proper magistrate. But if the demand exceeds $15 it must be made returnable before the county court in the county where the Pltf. or Deft. in the *si fa* dwells.

Miscellaneous Rules.

In actions on joint securities or contracts, when all the Deft. Defendants are not inhabitants of this state, service of the process on such as are

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inhabitants of the state shall be sufficient notice to hold them all to trial And if any such Deft. on whom the process was not served, is aggrieved by the Judgment he may be relieved by Audita Querela-

If one of the Deft. tho' out of the state at the time of the suit commenced, is an inhabitant of this state, service must be made on him by leaving a copy at the place of his usual place of abode here, and the suit of course must be continued as heretofore mentioned. If the court do not continue it one term at least & judgment is entered the Judgment is erroneous this point was decided in Middesex county by the Sup. Court about two years ago-

If the deft. in a suit is under the care of a "conservator" such conservator must be cited to appear and defend, but the omitting to do it does not abate the suit for the court will grant a reasonable time to cite him in- "Conservators" are appointed by the County Ct. and "Overseers" by Selectmen-

Where there are two or more Defts. and service is defective as to one of them, the Co. Deft. can take no advantage of it-

A deputy sheriff cannot serve process for or upon the sheriff- As he acts under the authority of the sheriff, his acts are the acts of the sheriff & it would be absurd that the sheriff should serve a process upon himself- But the sheriff may serve process for upon his & deputy this last point was decided by the Litchfield County Court in the case of James Beebe vs

Fed. Phelps at September term 1803. But the court were not unanimous the Chief Judge and one other Judge dissenting –

One Deputy sheriff may serve process for or upon an other Deputy sheriff for they are merely servant to one master –

When towns societies, trustees for schools, Proprietors of common and undivided lands, grants and other estates and interests and all other lawful societies or committees are to be sued, service is to be made in case of a town by leaving a copy with the selectmen or town clerks in case of societies, trustees for schools, proprietors &c with their clerks or Committee men –

Of the times at which service ought to be made –

By stat. provides that no person shall be required to an=swer in any civil action, unless the writ if returnable to the su=perior court or County Court, has been served at least 12 days inclusive before the 1st day of the Courts setting – or if returnable to an Assistant or Justice six days inclusive as aforesaid –

In suits against towns, societies, proprietors of common & undivided lands and other lawful committees, tho' the writ is returnable before a single magistrate, yet 12 days notice is re=quired –

A suit by foreign attachment must be served by having

a copy with the garnishee at least 14 days before the setting of the court, whether before superior, county, or single justice court.

So in suits against officers for not executing writs, or for not returning them, or for making a false return, service must be made on them 14 days before court.

In all these cases, the day on which the writ is served is included in the computation and the day on which the court sits is excluded. And if service is made on the last day allowed for making service, it must be completed before the evening twilight is gone, & while there is natural light enough left for the officer to read the writ & if not served before, the writ will abate for insufficient service.

It has been decided by the superior court that quitam prosecutions bror for the recovery of penalties are not within the foregoing rules as to notice the rule as to qui tam prosecutions is, that they may be commenced by forth with process.

If the qui tam prosecution is commenced in the form of civil action the same notice will be required as in civil actions.

On a citation to a conservator to appear in a cause, the usual notice is not required by the stat. as in other cases, all that is required is "reasonable notice" And as to what is reasonable notice the court are to decide.

Prac. of Com.

Of Bail.

Bail in Com. is of two kinds 1st Bail to the sheriff or other offic. and 2d ~~Bail~~ special Bail or Bail above - Our description of Bail does not at all correspond with the Eng.

1st As to Bail to the Officer - When the body of a Deft. is arrested under an attachment, it is the duty of the officer to keep him safely that he may have him forth coming at the return of the writ unless he offers and gives sufficient Bail for his appearance. The command in this writ being to attach the goods or estate of the Deft. and for want thereof take his body and him safely keep and have to appear before the court -

If no bail is offered or that which is offered is insufficient it is the duty of the officer to keep the Deft. safely & for this purpose he must be committed to Goal for safe custody -

In Com. a Deft. cannot be committed to Goal on mesne process without a mitimus - This mitimus is a precept directed to the Goaler by the magistrate who signs it, declaring therein the cause of the defendants arrest and commitment & commanding the Goaler to receive him and hold him safely, till released by due order of law -

By the Eng. stat. of 23 Hen. 6 & by a stat. of our own the

REEVE'S
LECTURES

IV